Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

DISABLED RIGHTS ACTION COMMITTEE,

Petitioner,

v.

FREMONT STREET EXPERIENCE
LIMITED LIABILITY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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52 pp

QUESTIONS PRESENTED

Where a plaintiff makes a claim alleging ongoing discriminatory conduct in violation of Title III of the Americans with Disabilities Act:

1. Whether the defendant may moot the cause of action by showing that the past instances of defendant's discriminatory conduct (that were identified in the complaint) have been corrected, but without showing that further instances of defendant's conduct will not occur in the future?

2. Whether an affidavit submitted in opposition to a defendant's motion for summary judgment may be disregarded, at the trial court's discretion, because the affidavit describes additional instances of the conduct that was the subject of the complaint, but which specific instances had not occurred until after the date of the complaint and were not described in the complaint?

PARTIES TO THE PROCEEDING

Petitioner

Petitioner is the Disabled Rights Action Committee, a Utah nonprofit corporation having members residing in Las Vegas, Nevada. Plaintiff is a member-based organization, and has no stock nor any corporate affiliations. The Disabled Rights Action Committee was one of the Plaintiffs in the District Court, and one of the Appellants in the Ninth Circuit Court of Appeals.

The other Plaintiffs in the District Court, and Appellants in the Ninth Circuit Court of Appeals, were three individual members of the Disabled Rights Action Committee: Carol Lee, Robert Lee, and Ronald Ray Smith.

Respondent

Respondent, Fremont Street Experience Limited Liability Company, ("FSELLC") is a Nevada limited liability company. FSELLC was a Defendant in the District Court, and was the Appellee in the Ninth Circuit Court of Appeals.

The Ninth Circuit Court of Appeals also (at times) considered some of the Defendants in the District Court to be Appellees (although they were never named in the appeal, never had any stake in the appeal, and were never involved in the argument of the appeal). The Defendants in the District Court that were at times considered to be Appellees were: Allright Corporation; The Coca-Cola Company; and Race Rock of Las Vegas, Inc.

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PETITION FOR A WRIT OF CERTIORARI

The Disabled Rights Action Committee respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit (App. A at 1a) is an unreported opinion (available at 44 Fed. Appx. 100, 2002 WL 1677949). The opinion of the district court (App. B at 6a) is an unreported opinion (which is not available in an unofficial reporter).

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals that is the subject of this Petition was entered on July 23, 2002. (App. A at 1a).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provisions, each of which is part of Title III of the Americans with Disabilities Act of 1990 ("ADA"):

Section 302(a) of the ADA, which generally proscribes discrimination "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to),

or operates a place of public accommodation." 42 U.S.C. § 12182(a).

Section 302(b)(1)(D) of the ADA, which provides (with regard to the construction of Section 302(a)) that "an individual or entity shall not, directly or through contractual or other arrangements, utilize standards or criteria or methods of administration (i) that have the effect of discriminating on the basis of disability; or (ii) that perpetuate the discrimination of others who are subject to common administrative control." 42 U.S.C. § 12182(b)(1)(D),

Section 302(b)(2)(A)(ii) of the ADA, which expressly defines a form of "discrimination," for the purposes of Section 302(a), to include:

> a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.
>
> 42 U.S.C. § 12182(b)(2)(A)(ii).

Section 303(a)(1) of the ADA further defines "discrimination for the purposes of section 302(a)" to include a public accommodation's "failure to design and construct facilities for first occupancy later than 30 months after the date of enactment of this Act that are readily accessible to and usable by individuals with disabilities." 42 U.S.C. § 12183(a)(1).

Section 306(b) of the ADA provides that "the Attorney

General shall issue regulations in an accessible format to carry out the provisions of this title [Title III] not referred to in subsection (a) [("Transportation Provisions")] that include standards applicable to facilities and vehicles covered under section 302." 42 U.S.C. § 12186(b).

This case involves the following regulatory provisions implementing Title III of the ADA. Each of these provisions is found at 28 C.F.R. Part 36, Appendix A (Appendix A contains the "ADA Accessibility Guidelines").

ADA Accessibility Guideline 4.1.1(4) states that the ADAAG's requirements "cover temporary buildings or facilities as well as permanent facilities. Temporary buildings and facilities are not of permanent construction but are extensively used or are essential for public use for a period of time."

ADA Accessibility Guideline 7.2(1) states that "In department stores and miscellaneous retail stores where counters have cash registers and are provided for sales or distribution to the public, at least one of each type shall have a portion of the counter which is a at least 36 in (915 mm) in length with a maximum height of 36 in (915 mm) above the finish floor." No alternate methods of compliance are authorized.

STATEMENT OF THE CASE

In 1995, one of Petitioner's disabled members residing in Las Vegas, Nevada, submitted to the Fremont Street Experience Limited Liability Company ("FSELLC") a written request that FSELLC modify its policies, practices and procedures to ensure that "ready access" would be provided at the temporary and mobile facilities allowed onto "The Fremont Street Experience" (a downtown Las Vegas street

mall over which FSELLC exercises control).

Despite the request, FSELLC continued to permit inaccessible temporary and mobile facilities to locate onto The Fremont Street Experience, and Petitioner (together with several of its disabled members) brought this action in 1998 (a First Amended Complaint was filed in early 2000).

On April 13, 2001, FSELLC moved for summary judgment, asserting that, because the specific instances of inaccessibility identified in the First Amended Complaint had been corrected, there was no genuine issue of material fact remaining for trial. FSELLC did not, however, offer any evidence to show that additional inaccessible temporary or mobile retail sales facilities would not be permitted onto the Fremont Street Experience in the future.

On April 21, 2001, Mr. Ronald Ray Smith (who was a wheelchair user and a member of Petitioner, the Disabled Rights Action Committee) visited The Fremont Street Experience and encountered temporary and mobile retail sales facilities which denied ready access to the disabled (specifically, a mobile grill and two mobile bars had customer service counters that were uniformly in excess of 36 inches in height).

On May 1, 2001, "Plaintiffs' Opposition to FSELLC's Motion for Summary Judgment" was filed and served. Attached to that pleading was the "Third Affidavit of Ronald Ray Smith," wherein Mr. Smith attested to having encountered inaccessible facilities at The Fremont Street Experience on April 21, 2001.

On May 24, 2001, the district court heard oral argument on FSELLC's motion for summary judgment.

On July 23, 2001, the district court's "Memorandum Opinion and Order Denying Plaintiffs' Motion for Summary Judgment and Granting Defendants' Motions for Summary Judgment" was entered. App. B at 6a. The district court granted summary judgment to FSELLC on two bases. First, the district court held that disabled persons could not show the requisite "injury in fact" to establish standing to bring a cause of action unless they had been "denied access" to a public accommodation App. B at 22a.[1] Second, the district court held that the correction of the inaccessible conditions, including temporary retail sales facilities, which were specifically identified in the First Amended Complaint rendered the cause of action moot. Accordingly, the additional evidence of FSELLC's alleged violation concerned "new issues" and was not admissible to show that the violation was ongoing. App. B at 19a.

The Disabled Rights Action Committee appealed the district court's decision to the Ninth Circuit. The Disabled Rights Action Committee argued that the district court had applied the wrong standard for "injury" under Title III of the ADA, that the district court had effectively reversed the standard for establishing mootness, and that the district court had improperly excluded timely-filed evidence.

The panel of judges assigned to the case (after briefing but without the benefit of oral argument) initially affirmed the district court in a decision based upon a section of the ADA that had not been cited by any party or by the district court at

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[1] Thus ignoring the ADA's mandate that facilities be "*readily* accessible to and useable by individuals with disabilities," 42 U.S.C. § 12183(a)(1) (emphasis added), and the associated legislative regulations defining "ready access" to customer service counters at retail sales facilities.

any time in the proceedings. On May 30, 2002,[2] the Disabled Rights Action Committee timely petitioned the Ninth Circuit for rehearing and rehearing en banc.

On July 23, 2002, the Ninth Circuit denied the petition for rehearing. Concurrent to that denial of rehearing, the Ninth Circuit panel entered a revised decision (again affirming the district court) which decision is the subject of this Petition.

The Ninth Circuit did not affirm the district court on

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[2] As noted, *infra*, the Ninth Circuit's decision is premised on the assumption that violations of 42 U.S.C. § 12182(b)(2)(A)(ii) (a provision proscribing discriminatory *conduct*) may be treated as a series of discrete violations for the purposes of determining mootness and of determining the admissibility of evidence, a premise which is contrary to this Court's decision in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. ___; 122 S.Ct. 2061 (2002). Significantly, the *Morgan* case was not decided by this Court until June 10, 2002, (a week *after* the petition for rehearing was filed). Petitioner did bring the *Morgan* decision to the attention of the Ninth Circuit (by way of a supplemental citation) to show that a "*series* of violations" is not required to establish a discriminatory "practice," but not to show the applicability of the *Morgan* decision to mootness and admissibility of evidence (the questions presented in this Petition). Where the Ninth Circuit has considered *Morgan* in the context of the admissibility of evidence, it has emphasized that this Court's holding in *Morgan* provides that a statute of limitations does not "bar an employee from using the prior acts as background evidence in support of a timely claim." and has noted that "[i]n the wake of *Morgan*, we must now decide how courts should determine what particular evidence of time-barred acts may be taken into account as 'background' evidence of present, actionable discrimination." *Lyons v. England*, ___ F.3d ___, ___, 2002 WL 31254934, *8 (9th Cir., October 9, 2002). Thus, there is "reason to believe the court below did not fully consider" the recent decision of this Court and a "reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration and . . . it appears that such a redetermination may determine the ultimate outcome of the litigation." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). Accordingly, "a GVR order is ... potentially appropriate." *Id.*

the basis of the district court's heightened requirement for showing injury under Title III of the ADA. Instead, the Ninth Circuit held that there was "no genuine issue of fact as to whether FSELLC's oversight practices have resulted in violations of the ADA." App. A at 5a. The Ninth Circuit's decision was based upon two determinations.

First, the Ninth Circuit noted that "a lone violation does not establish a pattern or practice on the part of the FSELLC"[3] and that evidence of "ongoing ADA problems at the Fremont Street Experience" was properly excluded from consideration by the district court. With regard to such evidence, the Ninth Circuit held that the district court had discretion to refuse to consider (as "untimely evidence") an affidavit filed and served 23 days prior to the hearing where the affidavit described "new issues" (i.e. evidence of the ongoing violation which had not been "addressed in the First Amended Complaint").

Second, the Ninth Circuit, while describing FSELLC's admission of a permissive policy[4] vis-a-vis "mobile vendors"

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[3] The relevant section of the ADA, 42 U.S.C. § 12182(b)(2)(A)(ii), refers to discriminatory "*policies*, practices *or* procedures." (emphasis added). Even though a discriminatory *policy* is at issue (in *addition to* a discriminatory practice) and even though that discriminatory policy is the subject of an *admission* (see App. A at 4a-5a), the Ninth Circuit (by application of the standards which are the basis of the Questions Presented in this Petition) has found an absence of a genuine issue of material fact because the record (after application of its evidentiary standards) was "devoid of details on any alleged violations." See App. A at 5a. Accordingly, the requisite *amount* of proof for a policy (or for a practice) is not a subject of this Petition.

[4] FSELLC admitted to maintaining a policy which permits temporary and mobile vendors onto The Fremont Street Experience as long as the vendors merely provide "equivalent service, if the vendor's counters are not compliant with regulations." App. B at 5a. Because the "equivalent

at the Fremont Street Experience, held that "the record is devoid of details on any alleged violations with mobile vendors." Such void, however, was the product of the Ninth Circuit's determination that the district court had properly refused to consider the Third Affidavit of Ronald Ray Smith and, furthermore, on the Ninth Circuit's determination that the unavailability of injunctive relief to remedy a particular instance of FSELLC's permitting inaccessible facilities onto the Fremont Street Experience rendered the prior instance immaterial for the purpose of showing FSELLC's permissive policy. Thus, the Ninth Circuit effectively placed upon the plaintiffs the burden of proving that the violation complained of had *not* been made moot.

While not explicit in its decision, each of the Ninth Circuit's determinations is essentially grounded on the premise that violations of 42 U.S.C. § 12182(b)(2)(A)(ii) (a provision proscribing discriminatory *conduct*) may be treated as a series of discrete violations for the purposes of determining mootness and of determining the admissibility of evidence.

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service" standard is insufficient to afford ready access under the applicable legislative regulations (compare 28 C.F.R. Part 36, Appendix A, ADA Accessibility Guideline 7.2(1) and ADA Accessibility Guideline 7.2(2)), FSELLC's policy continues to violate 42 U.S.C. § 12182(b)(2)(A)(ii).

REASONS FOR GRANTING THE WRIT

I. Regarding The Ninth Circuit's Finding Moot a Claim for Discriminatory Conduct Based on the Mooting of Past Instances of Discrimination.

A. The Decision Below Conflicts with Decisions of this Court.

The Ninth Circuit correctly noted that injunctive relief to correct a prior *instance* of FSELLC's policy of permitting inaccessible mobile retail stores onto the Fremont Street Experience was moot because the mobile retail store had ceased to do business. App. A at 4a. The Ninth Circuit, however, bootstrapped the mootness that is naturally inherent to a court's inability to prevent past *instances* of violative conduct into mootness regarding the underlying *conduct* itself. App. A at 4a.

There is a plain distinction between discrete *instances* of violations of civil rights and the *conduct* (such as policies, practices, or procedures) which *produces* the violations. Very recently, this Court has noted that claims alleging a course of discriminatory conduct "are different in kind from discrete acts. Their very nature involves repeated conduct. . . . Such claims are based on the cumulative affect of individual acts." *National Railroad Passenger Corp. v. Morgan*, 536 U.S. ___, ___, 122 S.Ct. 2061, 2073 (2002) (citations omitted) (discussing hostile environment claims in the context of employment discrimination).[5]

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[5] *See also EEOC v. Waffle House, Inc.*, 534 U.S. 279, ___, 122 S.Ct. 754, 768 n. 3, (2002) (THOMAS, J., dissenting) (in case alleging "unlawful employment *practices*, [the] EEOC's complaint . . . mentioned no instances of discriminatory conduct on the part of Waffle House other than its discharge of Baker.") (emphasis in original).

Section 302(b)(2)(A)(ii) of the ADA, 42 U.S.C. § 12182(b)(2)(A)(ii), proscribes discriminatory *conduct*, and the Ninth Circuit has not held otherwise. The Ninth Circuit has, instead, "bootstrapped" the mooted past *instances* of the discriminatory conduct into a mooting of the challenged conduct itself. The Ninth Circuit's version of the mootness doctrine is plainly at odds with this Court's precedent providing that: "Voluntary cessation of challenged conduct moots a case, however, only if it is '*absolutely* clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 221 (2000) (emphasis in original) (quoting *United States v. Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199, 203 (1968)). If a defendant can escape liability for ongoing conduct (under the doctrine of mootness) based upon the unlikelihood of the recurrence of specific, discrete instances of the conduct, then the burden of proof is effectively reversed as *plaintiffs* will have to show that the conduct will continue.

B. The Question Presented is Important.

In another case involving Section 302(b)(2)(A)(ii) of the ADA, 42 U.S.C. § 12182(b)(2)(A)(ii), this Court emphasized that "one of the [Americans with Disabilities] Act's most impressive strengths has been identified as its comprehensive character." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001) (internal quotation marks omitted).

On the same day that the Court decided *PGA Tour, Inc. v. Martin, supra*, it also decided *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598 (2001), which eliminated the use of the "catalyst" theory for awards of attorneys fees in civil rights lawsuits (including suits brought under Title III of the ADA). The Court, mindful of the significance of attorneys fees in

enforcing civil rights laws, considered the possibility of defendants' "unilaterally mooting an action before judgment in an effort to avoid an award of attorney's fees," *Id.* at 608, and dispelled that possibility as "only materializ[ing] in claims for equitable relief, for so long as the plaintiff has a cause of action for damages, a defendant's change in conduct will not moot the case." *Id.* at 608-09. The Court then stated that "it is not clear how often courts will find a case mooted: 'It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice' unless it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id.* at 609 (quoting *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189 (2000) (internal quotation marks and citations omitted).

The Ninth Circuit's decision shows how easily courts may find a case mooted. Under the Ninth Circuit's analysis, when considering mootness, ADA Title III claims regarding a defendant's *conduct* can be literally "disintegrated" into numerous claims regarding each discrete *manifestation* or *instance* of the conduct. Clearly, such an artifice not only diminishes the enforcement of the ADA by providing defendants with a method of avoiding attorneys fees, but it strikes at the very core of enforcement because (as in this case) it permits defendants to simply continue with policies that are in violation of the ADA.

The Ninth Circuit's decision undermines both the 'comprehensive character' of the ADA and the limitation that the mootness doctrine would otherwise place on this Court's decision in *Buckhannon*. Thus, the Ninth Circuit's decision is plainly at odds with the ADA's purpose of providing "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42

U.S.C. § 12101(b)(1).

II. Regarding The Ninth Circuit's Grant of Discretion to District Courts to Disregard Affidavits in Opposition to Summary Judgment.

A. The Decision Below Conflicts with Decisions of this Court.

In *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), this Court clearly stated that an "untimely" affidavit in opposition to a summary judgment motion is one which is not "served 'prior to the day of the hearing,'" *Id.* at 895 (quoting Fed. R. Civ. P. 56(c)).

Despite the clarity of the Rule 56(c) of the Federal Rules of Civil Procedure,[6] the Ninth Circuit has adopted a novel basis for according discretion to the district court to ignore an affidavit: where an affidavit provides evidence of "new issues" (i.e., instances of a defendant's discriminatory conduct that were not identified in the complaint) showing that the defendant's discriminatory conduct is ongoing, the affidavit will be *deemed* "untimely evidence" (despite the affidavit having been filed many days before the hearing).

As this Court has recently noted, plaintiffs "need not plead a prima facie case of discrimination" in order to survive a motion to dismiss. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, ___, 122 S.Ct. 992, 999 (2002). The standard adopted by the Ninth Circuit, however, requires a plaintiff opposing

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[6] Apart from the lower courts' decisions in this case, there is an absolute vacuum of precedent in federal case law which would accord a district court discretion to ignore an affidavit in opposition to a motion for summary judgment where the affidavit is submitted prior to the day of the hearing.

summary judgment to have included *even more* in its complaint than a mere prima facie case: the plaintiff must have included in the complaint sufficient *evidence* to present a genuine issue of material fact. In the case of an ongoing violation, of course, the best evidence of a defendant's conduct will always be the most recent evidence, and such evidence is simply not available at the time that a complaint is filed.[7]

In light of *National Railroad Passenger Corp. v. Morgan, supra,* the Ninth Circuit has recently adopted a more expansive approach to the admissibility of *old* evidence (evidence of time-barred acts) of discrimination,[8] so as to conform with *Morgan* and *United Air Lines v. Evans,* 431 U.S. 553 (1977). The Ninth Circuit's decision in this case does not permit a district court to ignore *old* evidence of discrimination. Instead, the Ninth Circuit has permitted the district court to ignore the *most recent* evidence of discrimination. In *United Air Lines v. Evans, supra,* this Court noted that "the critical question is whether any present violation exists." *Id.* at 558. The Ninth Circuit's standard for ignoring the *most recent* (and, perhaps, the *best*) evidence of the violation is plainly contrary to *Evans.*

Finally, as Mr. Ronald Ray Smith (whose affidavit was not considered by the district court) was named as a witness,

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[7] Recently, this Court has stated that "Scant sense supports the single occurrence, prevailing circumstance dichotomy. Why should a prisoner have immediate access to court when a guard assaults him on one occasion, but not when beatings are widespread or routine?" *Porter v. Nussle,* 534 U.S. 516, ___; 122 S.Ct. 983, 991-92 (2002). The sense in the Ninth Circuit's decision is still more scant: how can a disabled person be expected to identify in his complaint more than the specific instances of conduct in violation of the ADA that have already occurred?

[8] See, *Lyons v. England,* ___ F.3d ___, ___, 2002 WL 31254934, *8-9 (9th Cir., October 9, 2002).

the Ninth Circuit's standard is plainly contrary to the concurring opinion[9] of Justice White in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986):

> A plaintiff need not initiate any discovery or reveal his witnesses or evidence unless required to do so under the discovery Rules or by court order. Of course, he must respond if required to do so; but *he need not also depose his witnesses or obtain their affidavits to defeat a summary judgment motion asserting only that he has failed to produce any support for his case.* It is the defendant's task to negate, if he can, the claimed basis for the suit. . . . Petitioner Celotex does not dispute that *if respondent has named a witness to support her claim, summary judgment should not be granted without Celotex somehow showing that the named witness' possible testimony raises no genuine issue of material fact.*

Id. at 328 (emphasis added).

The Ninth Circuit affirmed summary judgment for FSELLC because it saw "no genuine issue of fact as to whether FSELLC's oversight practices have resulted in violations of the ADA." App. A at 5a. Not only did the Third Affidavit of Ronald Ray Smith provide such evidence, but Mr. Smith's trial testimony could have provided such evidence. Clearly, the affidavit should have been considered by the district court, and the Ninth Circuit erred in holding that the district court had discretion to ignore the affidavit.

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[9] Because Justice White was the fifth vote, his understanding of the case "would seem to be controlling." *Celotex Corp. v. Catrett*, 477 U.S. at 329 n. 1, (BRENNAN, J., dissenting) (citing *Marks v. United States*, 430 U.S. 188, 193 (1977)).

B. The Question Presented is Important.

This Court has noted that "an essential component of procedural fairness is an opportunity to be heard." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)(citing *In re Oliver*, 333 U.S. 257, 273 (1948); and *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)).

Under the Ninth Circuit's decision, disabled persons and a disabled rights advocacy organization have been prevented from introducing their best proof of ongoing discrimination. Accordingly, the Ninth Circuit's decision is again at odds with the ADA's purpose of providing "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1).

More fundamentally: "Any rule that impedes the discovery of truth in a court of law impedes as well the doing of justice." *Hawkins v. United States*, 358 U.S. 74, 81 (1958) (STEWART, J., concurring). It is a plain affront to fundamental principles of procedural fairness to prohibit a plaintiff, when opposing summary judgment, from entering more evidence than was set forth in the complaint.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Filed July 23, 2002]

DISABLED RIGHTS ACTION COMMITTEE, et al.,	)	No. 01-16657
Plaintiffs-Appellants, v.	)	D.C. No. CV-98-01514-JLQ
FREMONT STREET EXPERIENCE LIMITED LIABILITY COMPANY, et al.,	)	**MEMORANDUM***
Defendants-Appellees.	)	

Appeal from the United States District Court
for the District of Nevada
Justin L. Quackenbush, Senior Judge, Presiding

Submitted May 15, 2002**
San Francisco, California

Before: HAWKINS, SILVERMAN, Circuit Judges, and RESTANI, Judge.***

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** Honorable Jane A. Restani, Judge, United States Court of International Trade, sitting by designation.

A group of plaintiffs led by the Disabled Rights Action Committee appeals the grant of summary judgment in favor of the Fremont Street Experience Limited Liability Company ("FSELLC"). The appellants sought to enjoin the FSELLC from violating Title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12181, *et seq.* Because the parties are familiar with the facts, we will not recite them in detail except as necessary. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

The appellants contend that the FSELLC violates Title III of the ADA by failing to exercise due care to ensure that the temporary structures at the Fremont Street Experience comply with the ADA. The appellants point to several structures that allegedly violate government regulations as evidence of the FSELLC's poor oversight practices. *See* 42 U.S.C. § 12183(a); 28 C.F.R. Part 36 and Appendix A. Title III of the ADA provides: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a). In the event of a violation of 42 U.S.C. § 12182, the statutory scheme provides for injunctive relief. 42 U.S.C. § 12188; 42 U.S.C. § 2000a-3(a). The district court denied appellants' request for an injunction against the FSELLC, and we review a "summary judgment granting or denying a permanent injunction for abuse of discretion and application of the correct legal principles." *Midgett v. Tri-County Metro. Transp. Dist. of*

Oregon, 254 F.3d 846, 849 (9th Cir. 2001) (citation omitted).

A commercial facility discriminates under 42 U.S.C. § 12182(a) by failing to "design and construct facilities . . . that are readily accessible to and usable by individuals with disabilities . . . ." 42 U.S.C. § 12183(a)(1). It also may discriminate under 42 U.S.C. § 12182(a) by failing to make a reasonable modification in policies, practices, or procedures when such modifications are needed to afford access to individuals with disabilities. 42 U.S.C. § 12182(b)(2)(A)(ii). The appellants alleged that FSELLC engaged in discriminatory patterns and practices by providing inadequate oversight of the Fremont Street Experience, but they failed to come forward with proof sufficient to survive summary judgment. At most, the appellants brought forth evidence of one or two technical violations in the face of numerous instances of compliance. Appellants' evidence cannot be construed to show a discriminatory pattern, practice or policy. The appellants waived all of their other claims on appeal, and thus we conclude that the district court did not abuse its discretion in denying the injunction.

As a preliminary matter, we note that many of the structures challenged by the appellants are accessible only to employees of FSELLC, not to the general public. As a result, the appellants lack standing to assert ADA violations on the YESCO Shed, the parking attendant toll booths, the FSELLC restroom and executive offices, and the temporary stages. *See Long v. Coast Resorts, Inc., 267 F.3d 918, 924 (9th Cir. 2001).* In addition, the appellants explicitly waived any arguments in relation to those issues.

The remainder of the evidence brought forth by the appellants fails to create a genuine issue of fact regarding FSELLC's practices. The appellants do not argue on appeal that the district court erred in concluding that the Coca-Cola kiosk was built in compliance with the ADA regulations, and in any event, the issue is moot because this kiosk has been dismantled for reasons unrelated to the litigation. The

only remaining allegation is that the sales counters at a retail store in the now-defunct Race Rock restaurant violated Rule 7.2(1) of the *ADA Accessibility Guidelines*. Even assuming the Race Rock counter had violated ADA regulations, a lone violation does not establish a pattern or practice on the part of the FSELLC. Instead, an injunction could have been issued to remedy the Race Rock counter, but the issue is moot given that the Race Rock has gone out of business for reasons unrelated to this litigation.

The appellants argue that their concerns are not moot because there have been ongoing ADA problems at the Fremont Street Experience. The appellants contend that the district court erred by refusing to consider the third affidavit submitted by Ronald Smith, which alleged further violations at the Fremont Street Experience. We review the district court's refusal to consider untimely evidence for an abuse of discretion. *See Carpenter v. Universal Star Shipping, S.A., 924 F.2d 1539, 1547 (9th Cir. 1991).* We agree with the district court that the claims in the affidavit raise new issues that were not addressed in the First Amended Complaint, and thus the district court did not abuse its discretion in refusing to consider the affidavit.

The appellants point out that Mark Paris, President and Chief Executive Officer of FSELLC, stated that the company occasionally allows mobile vendors for special events at the Fremont Street Experience. Paris's declaration explains that the company's policy and practice is to instruct vendors to make accommodations, such as setting up a table next to the mobile facility to provide equivalent service, if the vendor's counters are not compliant with regulations. Because the record is devoid of details on any alleged violations with mobile vendors, however, we conclude that there is no genuine issue of fact as to whether FSELLC's oversight practices have resulted in violations of the ADA. In fact, the record reveals that FSELLC took seriously its obligations under the ADA and voluntarily remedied many

of the conditions complained of, whether they were required to or not.

In sum, the appellants have simply failed to bring forth evidence of a series of ADA violations at the Fremont Street Experience that would create a genuine issue as to whether the FSELLC's oversight practices could be construed as a violation of the ADA. Accordingly, the district court did not abuse its discretion in refusing to issue an injunction against the FSELLC.

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

[Entered and Served July 23, 2001]

DISABLED RIGHTS ACTION COMMITTEE, RONALD RAY SMITH, CAROL LEE, and ROBERT LEE	)
Plaintiffs,	) NO. CV-98-1514
vs.	)
FREMONT STREET EXPERIENCE LIMITED LIABILITY COMPANY, RACE ROCK OF LAS VEGAS, LLC, ALLRIGHT SIERRA PARKING INC., and ALLRIGHT CORPORATION,	) MEMORANDUM) OPINION AND) ORDER DENYING) PLAINTIFFS') MOTION FOR) SUMMARY) JUDGMENT AND) GRANTING) DEFENDANTS') MOTIONS FOR
Defendants.	) SUMMARY) JUDGMENT

Before the Court are Defendant Fremont Street Experience Limited Liability Company's Motion for Summary Judgment; Third-Party Defendant Coca Cola Company, Inc.'s Motion for Summary Judgment; and

Plaintiffs' Cross-Motion for Summary Judgment, heard on May 24, 2001, in Las Vegas, Nevada. Richard Armknecht appeared on behalf of Plaintiffs Disabled Rights Action Committee (DRAC) and Ronald Ray Smith, Carol and Robert Lee. Patrick J.R. Reilly appeared on behalf of Defendant Fremont Street Experience Limited Liability Company (FSELLC). Danielle Jacoboni appeared on behalf of Third-Party Defendant Coca Cola Company, Inc. (Coca Cola). Having reviewed the record, heard argument of counsel, and being fully advised in this matter, It Is Hereby Ordered that FSELLC's Motion for Summary Judgment is Granted; Coca Cola's Motion for Summary Judgment is Granted; and Plaintiffs' Cross-Motion for Partial Summary Judgment is Denied for the following reasons.

1. Factual and Procedural Background

Plaintiffs brought this action claiming that FSELLC has violated the Americans With Disabilities Act (ADA), 42 U.S.C. § 12182(a) and the applicable regulations including architectural standards for accessible design of public accommodations, as well as violating Nevada State's version of the ADA. Plaintiffs seek injunctive relief and damages for unjust enrichment under the ADA and compensatory damages under Nevada State law.

Plaintiffs now seek summary judgment as to the Defendant's liability. FSELLC and Coca Cola both contend they are entitled to summary judgment because all of the accessibility issues have been resolved and that Plaintiffs are not entitled to either prospective injunctive relief or damages. The court is satisfied Plaintiffs' position is without merit and that Defendants are entitled to summary judgment.

Plaintiffs DRAC and Ronald Ray Smith filed their original Complaint against FSELLC alleging that FSELLC had constructed a Coca-Cola vending kiosk at the Fremont Street Experience with a counter built too high off the ground for wheelchair users. FSELLC subsequently added

Coca Cola as a Third Party Defendant. It was also alleged that FSELLC occasionally erected temporary performance stages within the Fremont Street Experience that did not provide access to wheelchair-bound persons. Plaintiffs then filed an Amended Complaint adding Carol and Robert Lee as Plaintiff and adding Race Rock of Las Vegas, Inc., Race Rock of Las Vegas, L.L.C., Allright Sierra Parking Inc., and Allright Corporation as Defendants. The Plaintiffs alleged, inter alia, that a series of three parking attendant toll booth at a parking garage owned by the Fremont Street Experience and operated by Allright Sierra did not have ramps for wheelchairs which violated the ADA. The Plaintiffs further alleged that Race Rock, a restaurant still under construction at the Fremont Street Experience, and not yet open to the public at the time, violated the ADA. It was further alleged that a work shed (the Red Shed) operated by Young Electric Sign Company (YESCO) at the Fremont Street Experience violated the ADA. The Plaintiffs also added a claim of "unjust enrichment" against FSELLC, claiming that they were entitled to recover the full amount of economic gain realized by FSELLC during the time of the alleged illegal conduct.

Plaintiffs' Amended Complaint alleges that temporary performance stages, an employee work shed, and parking garage toll booths within the Fremont Street Experience violate the architectural guidelines for newly constructed places of public accommodation found in ADA regulations. To begin with, the court finds it unlikely that performance stages, employee work areas, and parking garage toll booths are places of "public accommodation." However, assuming that they meet the definition of public accommodation, there is a complete failure of any evidence in this record of an injury in fact. The record reflects, that Plaintiff Smith makes tours of the Fremont Street Experience and identifies what he believes to be ADA violations. There is nothing whatsoever in the record to establish an injury in

fact to any individual Plaintiff or any DRAC member. There is no evidence that anyone was ever denied access to a public area by reason of a failure to abide with the ADA.

The court is concerned that no party in this case has complied with Fed. R. Civ. P. 56 by filing a statement of undisputed facts or statement of disputed facts. However, Plaintiffs' have utterly failed to establish that they were denied accessibility to a temporary stage, employee work area or parking garage toll booth, much less that they were injured thereby. There is no showing in the record that anyone was denied employment by FSELLC or that anyone ever needed access to the YESCO work shed or the parking toll booths. Plaintiffs merely state . . . that they 'observed' certain conditions existing at the Fremont Street Experience on a given date. There is no contention that any of the Plaintiffs are or tried to be or desire to be entertainers denied access to a performance stage, or employees entitled to access the work shed, or employees working in the parking garage, who were denied access to the toll booths.

When the court directed Plaintiffs to state with particularity what formed the basis of Plaintiffs equitable and monetary damage claims, Plaintiffs only stated that inaccessible temporary stages set up on the property from time to time, inaccessible mobile retail sales facilities entering on the property from time to time, and inaccessible parking attendant kiosks formed the basis for their claims. The alleged violations noted by the Plaintiffs in these regards have all been remedied. FSELLC purchased lifts to be used with temporary performance stages, installed a ramp to the "Red Shed" designed by the Plaintiffs and ordered ramps, approved by the Plaintiffs, to be added to the remaining two toll booths. The only retail facilities identified by the Plaintiffs were the Coca-Cola kiosk and the Race Rock Restaurant under construction at the time. Both the Coca-Cola kiosk and the Race Rock Restaurant have been dismantled, for reasons unrelated to this litigation.

Additionally, the evidence establishes that the Coca Cola kiosk as designed and built did meet the ADA architectural requirements in that a portion of its counter was wheel chair accessible. A portion of the counter was no higher than 36 inches as required, and there was also a roll-out counter a maximum of 3 feet above finished grade. Correspondence between the City of Las Vegas and Coca-Cola establishes that all parties involved in the construction of the Coca-Cola kiosk were intent on meeting all ADA requirements while constructing the Coca-Cola kiosk. Plaintiffs suggestion that the plans may not have been followed in building the kiosk is without any factual support whatsoever. The court is satisfied that the Coca-Cola kiosk was built as designed and that it has been dismantled for reasons unrelated to this litigation. Therefore, any claim that the Coca-Cola kiosk did not comply with ADA regulations is moot, and it is clear that Coca Cola is entitled to summary judgment as to any claim against Coca Cola. Accordingly, Coca Cola's Motion for Summary Judgment is Hereby Granted.

As a result of this lawsuit, FSELLC unilaterally agreed to do the following: (1) lower a urinal in the Fremont Street executive offices by four inches; (2) lower an after-hours security buzzer at the Fremont Street offices; (3) instruct YESCO to modify its storage "red shed" by replacing the door handle and including a ramp leading to the entrance; (4) move two parking spaces identifying Fremont Street's Employee of the Month and Employee of the Year to another location, so that the parking spaces formerly identified for their use, could be re-labeled as handicapped parking spaces, and (5) instructed Race Rock to address inaccessibility issues raised by the Plaintiffs with respect to the Race Rock Restaurant being constructed.

Plaintiffs then dismissed all claims against Race Rock, which ceased operations on April 9, 2001. Accordingly, any claim by the Plaintiffs that the Race Rock

Restaurant is not ADA compliant is also moot. Plaintiffs never served Allright Sierra parking and Allright Corporation, who were then dismissed by the court. YESCO was also dismissed as a Third party Defendant by stipulation of the Plaintiffs. Therefore, the only remaining Defendant is FSELLC.

FSELLC used one of the Plaintiffs' engineers to design the ramp leading to the YESCO Red Shed, and also got Plaintiffs to approve the ramps leading to the three parking toll booths. Additionally, FSELLC purchased two wheelchair lift to be used at the Fremont Street Experience whenever a temporary stage was utilized.

On November 3, 2000, this court entered an Order re Pending Motions and Scheduling Order (Ct. Rec. 100). In that Order, the court directed Plaintiffs to file a final definitive statement re ADA violations and a definitive statement specifying with particularity what claims they are alleging as a basis for the requested equitable relief.

On November 16, 2000 (Ct. Rec. 104) Plaintiffs filed a "Statement of Claims as a Basis for Equitable Relief" stating that the existing physical violations of the ADA are as follows:

> A. Inaccessible temporary stages in violation of AGAAG 4.1.1(3) set up on the property from time to time.
>
> B. Inaccessible mobile retail sales facilities in violation of ADAAG 7.2(1) entering the property from time to time.
>
> C. Inaccessible parking attendant kiosks in violation of ADAAG 4.1.1(3).

The report then states:

> Inadequate oversight by Fremont Street Limited Liability Company of structures erected on or brought onto its property. The root cause of all of the discriminatory conditions complained of is a failure of the owner of the Fremont Street Experience

to exercise due care that Title III of the ADA is not violated on its property.

The statement concludes with the statement that the "inadequate oversight by FSELLC . . . provides the basis for equitable relief in the form of an accounting for profits to require FSELLC to disgorge to Plaintiffs its unjust enrichment by its failure to hire qualified ADA consultants to ensure that FSELLC meets the requirements of Title III of the ADA so that the federal civil rights of disabled persons living in or visiting Las Vegas would not be abrogated."

Clearly this statement is not at all definitive or specific and does not comply with the November 3, 2000 Order of this court.

2. Summary Judgment Standard

The purpose of summary judgment is to avoid unnecessary trials when there is no dispute as to the facts before the court. *Zweig v. Hearst Corp.*, 521 F.2d 1129 (9th Cir. 1975). The moving party is entitled to summary judgment as a matter of law where, viewing the evidence and the inferences arising therefrom in favor of the nonmovant, there is no genuine issue of material fact in dispute. Fed. R. Civ. P. 56(c); *Semegen v. Weidner*, 711 F.2d 141 (9th Cir. 1983).

The party seeking summary judgment bears the initial burden of informing the court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Where the moving party has met its initial burden with a properly supported motion, the party opposing the motion "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The party opposing the motion "may not rest upon the mere allegations or denials of his pleadings, but . . . he must set forth specific facts showing

that there is a genuine issue for trial." *Anderson, supra* at 248. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict." *Id.* A party opposing summary judgment must "do more than show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio,* 475 U.S. 574, 586.

Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude entry of summary judgment. Factual disputes which are irrelevant or unnecessary to the outcome are not counted. *Anderson, supra* at 248. Where there is a complete failure of proof concerning an essential element of the nonmoving party's case, all other facts are rendered immaterial, and the moving party is entitled to judgment as a matter of law. *Celotex, supra* at 323.

Affidavits that do not demonstrate personal knowledge are insufficient to defeat summary judgment. *Commodity Futures Trading Commission v. Save,* 611 F.2d 270, 282 (1979). Likewise, "legal memoranda and oral argument are not evidence and they cannot by themselves create a factual dispute sufficient to defeat a summary judgment motion where no dispute otherwise exists." *British Airways Bd. v. Boeing Co.,* 585 F.2d 946, 952 (9th Cir. 1978), *cert. denied,* 440 U.S. 981 (1979).

3. The Americans With Disabilities Act

Plaintiffs concede that money damages are not available under the federal ADA, but claim that they are entitled to injunctive relief and unjust enrichment under the federal ADA, as well as money damages under Nevada law, which does have a provision for money damages to injured plaintiffs.

A. Standing

Defendants argue that the Plaintiffs do not have standing to pursue their claims. The Plaintiffs are similarly situated individuals with disabilities who allege that they have been denied equal access to and usability of the facilities of the Defendants in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, *et seq.* – specifically Title III of that Act. Therefore, the court is satisfied that Plaintiffs do have standing for their claims under the ADA. However, I find that the Defendants are entitled to summary judgment, because there is a complete failure by the Plaintiffs to provide any evidence of injury in fact in the record, which is an essential element of Plaintiffs' case.

B. The Federal ADA

Plaintiffs' complaint invokes Title III of the ADA, which establishes a prohibition against discrimination by public accommodations. Title III provides in relevant part, that:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of anyplace of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a).

The ADA mandates that places of public accommodation and commercial facilities shall be accessible to persons with disabilities. For commercial facilities and places of public accommodation, this mandate is encompassed within Title III of the ADA, 42 U.S.C. § § 12181, *et seq.* Title III's provisions are implemented through regulations promulgated by the Department of Justice which include guidelines for new construction and alterations. *See* 42 U.S.C. § 12186(a); 28 C.F.R. Part 36 and

Appendix A. These guidelines are called the Americans with Disabilities Act Access Guidelines specifically designed for application to newly constructed and altered facilities.

Plaintiffs concede that the Title III of the federal ADA provides only for preventive and injunctive relief, but argue that disgorging FSELLC of all profits is preventive and is therefore available under the federal ADA. I disagree.

(1) Unjust Enrichment

Under Title III of the ADA, which deals with public accommodations and services operated by private entities, 42 U.S.C. § 12188(a)(1) states:

> The remedies and procedures set forth in section 2000a-3(a) of this title are the remedies and procedures this subchapter provide to any person who is being subjected to discrimination in the basis of disability in violation of this subchapter or who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of section 12183 of this title.

42 U.S.C. § 2000a-3(a) allows aggrieved persons in a civil action to seek . . .

> preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, [which] may, in its discretion permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance.

The unjust enrichment relief sought by the Plaintiffs is a form of monetary relief, not available to individuals under Title III of the ADA. In creating a cause of action for private individuals, Congress limited the remedies available under that cause of action to preventive or equitable relief. *Fischer v. SJB-BD. Inc.*, 214 F.3d 1115, 1120 (9th Cir. 2000).

Monetary relief is not an option for private individuals under Title III of the ADA. Therefore, at most, a Plaintiff who filed a Title III ADA claim can hope to improve access through an for injunction and nothing more. *Id.*

(2) Injunctive Relief

In order to obtain injunctive relief, Plaintiffs must establish (1) they suffered an injury in fact; (2) the injury is fairy traceable to the challenged action of the Defendant; and (3) it is likely as opposed to speculative, that the injury will be redressed by a favorable decision. *See Tyler v. Cuomo*, 236 F.3d 1124 (9th Cir. 2000). "An injury in fact" is an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical." *Id.* at 1131.

There is a complete lack of a showing of injury in fact in this case. There is no allegation that any Plaintiff was ever employed or sought employment as an entertainer with the Fremont Street Experience, which would entitle them to access a temporary performance stage, or that any Plaintiff was denied access to a temporary retail structure, or access to the employee work area "Red Shed" or was ever denied access to a parking toll booth. Plaintiffs have not established the invasion of a legally protected interest which is concrete and particularized and actual or imminent.

(a) Temporary Stages

Occasionally temporary performance stages are erected at the Fremont Street Experience for special events. However, FSELLC has always had a policy of not allowing the public to access these temporary stages. While public access to temporary stages is contractually prohibited, FSELLC has nevertheless purchased two wheelchair lifts for access to temporary stages, should it become necessary. Only performers and their staffs are allowed access to a temporary stage. None of the Plaintiffs have ever been employed as or by a performer at a Fremont Street

Experience event. Plaintiff Smith claims his dignity was affronted when he recently observed a pickup bed being used as a temporary stage, without use of a wheelchair lift, that was only large enough to accommodate the one nondisabled entertainer. Clearly this does not satisfy the requirement the invasion of a concrete and particularized actual or imminent legally protected interest to establish an injury in fact fairly traceable to the challenged action of the Defendant.

(b) Temporary Mobile Retail Structures.

In this category, Plaintiffs alleged that the Race Rock Restaurant violated the ADA, a claim that has now been dismissed. Plaintiffs further alleged that the Coca-Cola kiosk violated the ADA because its counter exceed the ADA height requirement. However, as discussed *supra*, the Coca Cola kiosk as designed and built did meet all ADA requirements and has now been dismantled as has the Race Rock Restaurant.

(c) Parking Attendant Toll Booths

The Fremont Street parking garage contains a row of three parking attendant toll booths, through which automobiles exit upon leaving the garage. At the time this Complaint was filed, only one of the three had a wheelchair ramp leading to the booth. The parking garage is managed by Allright Sierra Parking, Inc., which has now been dismissed as a Defendant. None of the Plaintiffs are employed or have ever applied for employment as a parking attendant with Allright Sierra Parking. Nevertheless, FSELLC has voluntarily agreed to and is in the process of installing ramps leading the two remaining toll booths, the design of which the Plaintiffs have approved.

(d) The YESCO Red Shed

The Red Shed is an employee work shed for employees of Young Electric Sign Co., who has now been dismissed as a Defendant. Once again, there is no evidence that any Plaintiff was ever employed by or applied for work

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with YESCO, which would entitle them to access to the Red Shed. Nevertheless, FSELLC has had a ramp designed by the Plaintiffs built leading to the Red Shed. Mr. Smith now claims that the ramp does not have a level landing at the top, ignoring the fact that the Red Shed ramp was designed by the Plaintiffs.

Therefore, every alleged violation of the ADA alleged in Plaintiffs' Original and Amended Complaint has been remedied, whether or not it was required under the ADA.

Plaintiffs now try to assert new claims by way of an affidavit of Plaintiff Smith filed on May 1, 2001, stating newly observed problems at the Fremont Street Experience. This affidavit raises completely new issues. The court is satisfied that it is not going to order prospective injunctive relief based on these newly raised issues. Even as to these newly observed problems, there has been no showing of injury in fact. If Plaintiffs feel that they can establish that they have suffered an injury in fact by way of the newly raised problems, and are unable to get relief from FSELLC or whoever is responsible, these new issues could form the basis of a new case seeking preliminary injunctive relief.

Plaintiffs' citation to *Concerned Parents to Save Dreher Park Ctr.*, 884 F.Supp. 487 (S.D. Fla. 1994) is misguided. In that case, an association of disabled persons and individual disabled persons sued a city alleging that the city's proposed budget cuts would eliminate recreational programs for disabled persons in violation of the ADA. The court found that the individual plaintiffs were entitled to a permanent injunction requiring the city to continue to effectuate a plan to establish special recreations programs for the plaintiffs because the plaintiffs were participants in the program for persons with disabilities that was eliminated by the budget cuts.

The 12 named plaintiffs were participants in the City's Special Populations Program for persons with

disabilities at Dreher Park . . . .

> Each of the plaintiffs benefitted from the program for individuals with disabilities available at the Dreher Park Center.
>
> In September of 1993 the City eliminated the Dreher Park Center program during budget cuts provoked by a shortfall in revenue. At that time, there was no program in place that was suitable to provide any recreational services to the 12 plaintiffs, who were qualified individuals with disabilities who sought to enjoy the benefit of the City's leisure services program. Coupled with the City's complete elimination of the program for persons with disabilities was an extreme disparity between the extent of the budget cuts for the disabled population and the nondisabled. The combination of these factors constituted a violation of Title II because the city had effectively denied plaintiffs the benefit of the leisure services on account of their disabilities.

Id. at 488-489.

Thus, the plaintiffs had clearly established an injury in fact. The court was careful to note that the plaintiff were only entitled to an injunction requiring the City to continue to effectuate its plan to establish a special recreational program that will be available to the plaintiffs on an equal basis with the nondisabled. The court found that the plaintiffs had no standing to seek a permanent injunction obligating the court to oversee the City's completion of its self-evaluation and transition plans.

To the contrary here, no Plaintiff has been denied the opportunity to benefit from enjoyment of the Fremont Street Experience on account of their disabilities. Excluding plaintiffs from access to temporary performance stages, employee work areas, and parking toll booths has no more impact on the disabled than on nondisabled members of the general public, who are also denied access to temporary

performance stages, employee work areas, and parking toll booths.

In *Natural Resources Defense Council v. Southwest Marine, Inc.*, 236 F.3d 985 (9th Cir. 2000), the court found that environmental organizations had shown "injury in fact" because members had testified they had derived recreational and aesthetic benefit from use of a bay and that their use had been curtailed because of their concern about pollution and contaminated fish. The court found that the injury was fairly traceable to the defendant's conduct because the plaintiffs had shown that the defendant had discharged a pollutant that caused or contributed to the kind of injuries alleged.

Here, there is no allegation that members of the Disabled Rights Association or any individual Plaintiff ever derived any benefit from the temporary stages, Coca-Cola kiosk, Red Shed, or parking toll booths at the Fremont Street Experience or that their use of the Fremont Street Experience has been curtailed in any way by their inability to access temporary stages, temporary retail kiosks, employee work areas, or parking toll booths.

Plaintiffs cite *Steger v. Franco, Inc.*, 228 F.3d 889 (8th Cir. 2000) in support of their injunctive argument. In that case, disabled persons sued the owner of an office building, seeking an injunction to compel the owner to bring the building into compliance with the ADA. The court found that none of the plaintiffs had established an injury in fact except for one blind plaintiff who had attempted unsuccessfully to access a restroom in a restaurant within the building because the restroom's sign was not ADA compliant. The court stated that to demonstrate injury in fact, a plaintiff must show that he or she sustained or is in danger of sustaining some direct injury as the result of the challenged conduct and that the injury or threat of injury is both real and immediate, citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983). (Emphasis added).

> Although plaintiffs need not engage in the 'futile gesture' of visiting a building containing known barriers that the owner has no intention of remedying . . . they must at least prove knowledge of the barriers and that they would visit the building in the imminent future but for those barriers. *See Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167 . . . .

Id. at 892. (Emphasis added).

Plaintiffs here have knowledge of what they perceive to be ADA violations at the Fremont Street Experience. However, there is no claim here that any of the Plaintiffs have ever been employed or sought to be employed by FSELLC, where they encountered barriers to a temporary stage, or employee work area or that any Plaintiff was unable to exit the parking garage due to the lack of ramps at two of three parking attendant toll booths, or that any Plaintiff was denied access to a retail kiosk that they desired to use, or that they would do so in the future but for the ADA violations.

In all of the cases cited by the Plaintiffs there was clear evidence of an injury in fact. There clearly is no claim here that any of the individual Plaintiffs, nor any member of DRAC has in any way been injured by any of the claimed violations of the ADA. Plaintiffs claims are simply that they have witnessed temporary stages, temporary retail facilities, employee work areas, and parking toll booths that do not meet the building specifications of the ADA regulations. There is no allegation that any Plaintiff has suffered any concrete or direct injury as a result of these alleged violations.

The Plaintiffs in this case seek injunctive relief by having this court order (1) FSELLC to hire someone to conduct a thorough ADA Title III review of all structures built at the Fremont Street Experience or temporarily located to the Fremont Street Experience; and or (2)

monetary civil contempt sanctions for any new violations, without citing any authority for either request. Yet, Plaintiffs argue that FSELLC cannot delegate its responsibilities to ensure ADA compliance to anyone they might hire.

In *Dreher Park, supra*, the plaintiffs sought a permanent injunction imposing extensive, finely detailed requirements on the City and to require the City to consult with the plaintiffs about every aspect of the leisure services operations.

> The Court declines the plaintiffs' invitation to place the City's leisure services department permanently under the joint supervision of the Court and the plaintiffs in this action. The Court finds that the plaintiffs have failed to establish any justification for the Court to substitute its judgment for that of the city administration as to how to comply with the ADA, or for the court to oversee the City's efforts to comply.

Id. at 489-490.

Here, too, the court sees no justification for this court to substitute its judgment for that of the FSELLC as to how to comply with the ADA or for this court to oversee FSELLC's efforts to so comply. There is nothing in the record to be the basis for this court becoming the monitor for FSELLC compliance with the ADA. FSELLC has voluntarily remedied every ADA violation alleged by the Plaintiffs, whether or not it was actually a violation. I therefore must conclude that the Plaintiffs are not entitled to injunctive relief under the federal ADA.

C. The Nevada ADA

Plaintiffs also seek compensatory damages under the Nevada ADA. In a very similar case also brought by DRAC and Plaintiff Smith alleging structural violations of the ADA and Nevada State law, which Plaintiffs had observed at the Orleans Hotel and Casino, Magistrate Judge then, now

District Court Judge Hunt found that the Nevada ADA provision for damages was intended for cases of discrimination directed toward specific individuals and is not intended to provide a right to recover monetary damages for deficiencies in the design of a structure. *Long v. Coast Resorts, Inc.*, 32 F.Supp.2d 1203 (D. Nev. 1999). Judge Hunt noted that the Nevada Supreme Court has not ruled on this issue, but in a very well reasoned opinion found it unnecessary to try to divine what Nevada's courts will do.

Judge Hunt found that the plaintiffs had failed to show they had suffered any injury, or that Defendants' actions were the proximate cause of the injury, or that Defendants' actions were in violation of any duty owed to the Plaintiffs which could entitle them to monetary damages. *Id.* at 1210.

> Liability may not be found in a vacuum. Plaintiffs must show they suffered an injury that Defendant's actions were the proximate cause of the injury and that Defendant's actions were in violation of a duty owed to the Plaintiffs. It is clear that Defendants had and have a duty to construct and maintain facilities that comply with the ADA and the Nevada ADA, and that for a time, at least with respect to those items which existed but were corrected, there was a violation of that duty. However, the mere violation of a law or regulation does not establish injury any more than it is enough to compel the issuance of an injunction.
>
> . . .
>
> Plaintiffs are obligated to show, by competent evidence, that Defendants' actions caused injury to them. Otherwise, any disabled person situated anywhere in the world, could make a claim for damages against the Defendants. It is the denial of accessibility to Plaintiffs which is at issue.

> Plaintiffs' motion utterly fails to establish that they were denied accessibility, much less that they were injured thereby. They merely state . . . that they 'observed' certain conditions existing at the Orleans on a given date. They do not show that they were guests, or attempted to be, or even desired to be, guests of the Orleans. They do not show that they were forced to seek accommodations elsewhere or even suggest that they were injured, monetarily, physically, or emotionally, by the conditions which they saw.
>
> Plaintiffs have the burden of proving that they suffered injury by reason of the Orleans' actions and that there is a reasonable probability of the existence of a causal connection between the Orleans' actions and some damage to them. This element of proof is called the fact of damage and is a predicate to finding liability. Only then can the Court permit a finding of the amount of damages.

Id. at 1210

Plaintiffs argue that this court is not bound by *dicta* in *Long* that the Nevada ADA is not intended to provide a right to recover damages for deficiencies in the design of a structure. While this court is not bound by *Long*, I find the reasoning of Judge Hunt in that case to be very well reasoned and sound.

Plaintiffs rely heavily on the case of *Independent Living Resources v. Oregon Arena Corp.* 982 F.Supp. 698 (D. Or. 1997). In that case, a disabled attorney and a nonprofit advocacy organization for the disabled brought action against the owner and operator of the Rose Garden in Portland, Oregon alleging that the arena as constructed violated both the federal ADA and the Oregon counterpart. The Plaintiffs in that case had attempted to purchase tickets and were told that there were no wheelchair tickets available, while their ambulatory friends were able to

purchase conventional seats. Therefore, the plaintiffs had clearly set forth facts to establish injury in fact.

The court noted that as a general rule, "the objective of Title III is to provide persons with disabilities who utilize public accommodations with an experience that is functionally equivalent to that of other patrons, to the extent feasible given the limitations imposed by that person's disability." The court noted that the ADA "does not require a public accommodation to fundamentally alter the nature of the goods or services being provided."

Here it is clear that no patrons of the Fremont Street Experience have access to the temporary performing stages, employee work areas, or parking garage toll booths.

The Oregon court also found that damages were not available under the Oregon ADA, just as Judge Hunt found concerning the Nevada ADA.

> Here, plaintiffs have alleged hundreds, if not thousands, of individual violations including, *inter alia*, the placement of the ketchup, feminine hygiene products, and toilet paper dispensers; the design of the drinking fountains, the Trail Blazer's locker room and the handrails on the walkways; and the length of the telephone cords. However, the record does not show that plaintiffs personally attempted to obtain ketchup and were unable to do so, or were unable to use a drinking fountain or toilet paper dispenser or to make a telephone call, or were injured by a faulty handrail. Nor does the record show that plaintiffs personally were injured by the alleged violations in the design of the Trail Blazer's locker room, or that plaintiffs have ever been in that locker room in any capacity other than as parties to this lawsuit.
>
> I also question whether ORS 659.425(4) applies to passive conduct, e.g., the failure to retrofit a building to be wheelchair accessible, or to install a

> wheelchair ramp, or to install wheelchair lifts on buses. Rather, the language of the statute is unlawful to make any distinction, discrimination or restriction because a customer or patron is a disabled person' suggests active conduct of some sort, especially conduct that is targeted to a specific individual.
>
> . . .
>
> I conclude that ORS 659.425(4) was not intended to provide a right to recover damages for deficiencies in the design of a structure.

Id. at 773.

Plaintiffs have set forth no facts to even suggest that they were injured, monetarily, physically, or emotionally, by the conditions which they saw at the Fremont Street Experience.

Plaintiffs argue that monetary damages for intangible injuries to an individual are proper under Nevada law, relying on Plaintiff Ronald Ray Smith's affidavit stating that he "sustained considerable affront and indignity" due to ongoing discrimination at the Fremont Street experience, including inaccessible work areas as being analogous to a "No Disabled Persons Need Apply" sign. The court cannot agree.

N.R.S. § 651.070 provides that all persons are entitled to equal enjoyment of places of public accommodation, without discrimination or segregation on the ground of disability. N.R.S. § 651.090 provides that any person who withholds, denies, deprives, or attempts to withhold, deny or deprive any other person of any right or privilege as secured by N.R.S. § 641.070 is liable for damages. This court agrees with Judge Hunt that liability under the Nevada ADA cannot be found in a vacuum. Rather, the language of the Nevada statute refers to actions by persons and appears to be directed toward personal activities which deny or deprive disabled persons of their rights, where personal

conduct, rather than structural defects, are the source of the discrimination.

As was the case in *Long v. Coast Resorts, supra*, 32 F.Supp.2d 1203, Plaintiffs are obligated to show, by competent evidence, that Defendants' actions caused injury to them. Otherwise any disabled person situated anywhere in the world, could make a claim for damages against the Defendants. It is the denial of accessibility to Plaintiffs which is at issue. Plaintiffs have made no such showing. Therefore, I find that Plaintiffs are not entitled to recover money damages under the Nevada ADA.

4. Conclusion

For the foregoing reasons, this court can only conclude that the Plaintiffs have failed to establish an essential element of their case. There is simply no evidence that any Plaintiff has suffered an injury in fact as to any of the alleged violations of either the federal ADA or of the Nevada ADA. Therefore, Plaintiffs have not established that the are entitled to any injunctive relief or unjust enrichment under the federal ADA or any right to recover compensatory damages under the Nevada version of the ADA. Even construing all facts and inferences arising therefrom in the light most favorable to the Plaintiffs, the court must conclude that Plaintiffs have not set forth disputed material facts, sufficient to avoid summary judgment, nor undisputed facts sufficient to entitle Plaintiffs to summary judgment. Accordingly, Plaintiffs' Motion for Summary Judgment is Denied and FSELLC's Motion for Summary Judgment must be and is Granted.

It Is So Ordered. The Clerk is directed to enter Judgment against the Plaintiffs in favor of the Fremont Street Experience Limited Liability Company and Coca-Cola Company, Inc. dismissing Plaintiffs' Amended Complaint

and claims therein With Prejudice. The Clerk is further directed to enter this Memorandum Opinion and Order and forward copies to counsel.

IT IS SO ORDERED.

DATED this 18th day of July, 2001.

JUSTIN L. QUACKENBUSH
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Filed July 23, 2002]

DISABLED RIGHTS ACTION COMMITTEE, et al.,	)	No. 01-16657
Plaintiffs-Appellants, v.	)	D.C. No. CV-98-01514-JLQ District of Nevada, Las Vegas
FREMONT STREET EXPERIENCE LIMITED LIABILITY COMPANY, et al.,	)	ORDER
Defendants-Appellees.	)	

Before: HAWKINS, SILVERMAN, Circuit Judges, and RESTANI, Judge.

The memorandum disposition filed May 20, 2002, is withdrawn and is replaced by a memorandum disposition filed contemporaneously with this order.

The panel has voted to deny the petition for panel rehearing, and Judges Hawkins and Silverman have voted to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the petition for rehearing en banc is rejected.

Supreme Court U.S.
FILED
DEC 17 2002
OFFICE OF THE CLERK

No. 02-625

IN THE

Supreme Court of the United States

DISABLED RIGHTS ACTION COMMITTEE,

Petitioner,

v.

THE FREMONT STREET EXPERIENCE LIMITED LIABILITY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, The Fremont Street Experience Limited Liability Company, has no parent corporation and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

This matter arises under the Americans With Disabilities Act of 1990 (the "ADA") in which the district court granted summary judgment in favor of Defendant The Fremont Street Experience Limited Liability Company (the "FSELLC") and against Plaintiffs Ronald Ray Smith, Carol Lee, and Robert Lee (collectively the "Individual Plaintiffs"), and the Disabled Rights Action Committee (the "DRAC").[1] Specifically, the district court action concerned certain facilities at the Fremont Street Experience in Las Vegas, Nevada.

The district court action became an example of how a well-intentioned and important federal law can be manipulated to tilt the careful balance struck between the rights of the disabled and the legitimate interests of American businesses. Specifically, in an effort to resolve the district court action, the FSELLC repeatedly accommodated the DRAC's unreasonable demands by making alterations to its facilities, even though the ADA did not require such alteration. As a result, the FSELLC went well beyond what was actually required by the ADA in accommodating the DRAC.

This Petition does ***not*** seek to remedy existing ADA violations. In fact, there are no longer any individuals involved in this matter, and the DRAC is the only remaining party pursuing this case. Rather, the DRAC devotes most of its Petition to arguing that it was entitled to a permanent injunction because the ADA violations alleged by the DRAC

1. The DRAC is the only remaining party pursuing in this matter. Individual plaintiffs Robert and Carol Lee did not participate in the Ninth Circuit appeal, and Mr. Smith has not joined in the DRAC's Petition for Writ of Certiorari.

are capable of repetition, and that the challenged conduct ***could*** recur at a later time. However, the district court never concluded that the FSELLC violated the ADA. In fact, in its order affirming summary judgment, the Ninth Circuit Court of Appeals remarked that the FSELLC "took seriously its obligations under the ADA and voluntarily remedied many of the conditions complained of, whether they were required to or not." The DRAC also fails to note that this litigation involved voluntary changes by the FSELLC to ***permanent physical structures***, as opposed to practices or policies. As a result, there is no basis for the DRAC to allege that the FSELLC will "resume" purported ADA violations once this litigation is concluded.

Accordingly, the FSELLC respectfully requests that this Court deny the Petition for Writ of Certiorari.

PROCEDURAL HISTORY

The DRAC and individual plaintiff Ronald Ray Smith commenced the lower court action on October 26, 1998, alleging two violations of the ADA. On November 2, 1999, the DRAC and Mr. Smith moved for leave to amend their Complaint, alleging additional violations of the ADA, and seeking to add Mr. and Ms. Lee as new parties to the litigation. Concurrently, the DRAC and the Individual Plaintiffs applied for a temporary restraining order and moved for a preliminary injunction concerning the new claims. On November 3, 1999, U.S. District Court Judge Howard McKibben denied the Application for Temporary Restraining Order, as the DRAC failed to file any affidavits in support of its Application. Subsequently, and after a hearing on December 22, 1999, Judge McKibben denied the Motion for Preliminary Injunction.

The district court action was ultimately reassigned to visiting Judge Justin L. Quackenbush. After participating in discovery, the FSELLC moved for summary judgment on April 13, 2001. The DRAC filed its written opposition on or about April 30, 2001, and within that same document made a counter-motion for summary judgment. After hearing oral argument on May 24, 2001, Judge Quackenbush granted the FSELLC's Motion for Summary Judgment, and denied Appellants' counter-motion. A formal memorandum opinion was entered on July 23, 2001, and judgment was entered in the FSELLC's favor on July 24, 2001. The Ninth Circuit Court of Appeals affirmed the district court order granting summary judgment in favor of the FSELLC, and *en banc* review was subsequently denied.

STATEMENT OF THE CASE

A. The Parties.

According to the Amended Complaint, Plaintiffs Ronald Ray Smith, Carol Lee, and Robert Lee are disabled persons, required to use a "wheelchair or mobilized scooter for mobility." The DRAC is a non-profit corporation with "over one thousand (1,000) members nationwide, most of whom are disabled." Mr. Smith, Ms. Lee, and Mr. Lee have not joined in the DRAC's Petition.

The FSELLC is a limited liability company that maintains and operates the Fremont Street Experience, a commercial and entertainment attraction in downtown Las Vegas, Nevada. The Fremont Street Experience consists of five blocks of what was formerly Fremont Street, which was closed to vehicular traffic and rebuilt as a commercial and entertainment complex. The Fremont Street Experience, which is adjacent to the many downtown casino resorts, offers

a variety of activities for its visitors, including shopping, entertainment, and special events. Adjacent to the Fremont Street Experience is a parking structure several stories tall, which is owned by the FSELLC's affiliated entity, the Fremont Street Experience Parking Corporation (the "FSEPC").

B. Allegations of ADA Violations.

On October 26, 1998, Mr. Smith and the DRAC commenced the district court action, alleging that the FSELLC constructed a Coca-Cola vending kiosk with a counter built too high off the ground. Mr. Smith and the DRAC also alleged that the FSELLC occasionally erected temporary stages that did not provide disabled access to members of the public.

Subsequently, on or about November 2, 1999, Mr. Smith and the DRAC moved to amend their Complaint.[2] The Amended Complaint added Robert Lee and Carol Lee as plaintiffs, and added Race Rock of Las Vegas, Inc., Race Rock of Las Vegas, L.L.C., Allright Sierra Parking, Inc., and Allright Corporation as defendants. The DRAC and the individual plaintiffs alleged *inter alia* that certain portions of a parking structure owned by the FSEPC, including a series of three toll booths at the building's exit, violated the ADA. The DRAC also claimed that the Race Rock Supercharged Restaurant (the "Race Rock"), an establishment still under construction at the time and ***not yet opened*** to the public, violated the ADA. The DRAC and the Individual Plaintiffs made this allegation without ever seeing the inside of the establishment, but rather by viewing Internet photographs of another Race Rock restaurant located in Orlando, Florida.

2. The motion to amend was granted by the district court.

At the same time, the DRAC applied for a temporary restraining order and moved for a preliminary injunction. Curiously, the DRAC did not seek alteration of allegedly inaccessible facilities. Rather, the DRAC sought the following broad relief:

> 1. to enjoin the FSELLC "from permitting any more public accommodations to open for business unless and until [the FSELLC] can demonstrate (by competent testimony given by a an [sic] ICBO-Certified Building Code Accessability/ Usability Specialist) that such new public accommodation meets the minimum accessability requirement of Title III" of the ADA; and
>
> 2. to enjoin the FSELLC "(and such other defendants as may be subsequently added to the complaint by amendment) from permitting the continued operation of public accommodations . . . unless and until [the FSELLC] can demonstrate (by competent testimony given by an ICBO-Certified Building Code Accessability/ Usability Specialist) that such new public accommodation meets the minimum accessability requirement of Title III" of the ADA.

Effectively, the DRAC sought ***to shut down*** the Fremont Street Experience, without ever having established that the FSELLC had committed an ADA violation, and without knowing whether new facilities would be constructed or what would be constructed. Additionally, because the district court had not yet granted the DRAC's motion for leave to file its proposed Amended Complaint (which named additional defendants to the action), the DRAC was demanding immediate injunctive relief against persons that were not even parties to the litigation.

District Court Judge McKibben denied the Application for Temporary Restraining Order for the DRAC's failure to attach supporting evidence, and thereafter instructed counsel to confer in an effort to resolve accessibility issues. At that time, the instant litigation became quite contentious. The period was marked by an incident in which Mr. Smith circumvented the discovery process by venturing into the FSELLC's executive offices, committing a criminal trespass and proceeding past the receptionist without permission, and photographing areas of the FSELLC's office that are not open to the public. In addition, Mr. Smith communicated directly with FSELLC employees about the case, in spite of the fact that litigation was already pending between the parties. When the FSELLC offered to mediate accessibility issues, the DRAC declined, stating that it wanted a "judgment" against the FSELLC.

Despite these differences, the FSELLC unilaterally and unconditionally agreed to do the following: (1) lower by four inches a urinal located in a private restroom of the FSELLC executive offices; (2) lower an after-hours security buzzer at the FSELLC offices; (3) instruct Third-Party Defendant Young Electric Sign Company ("Yesco") to modify a storage shed by replacing the door handle and including a ramp leading to the entrance; (4) move two parking spaces identifying the FSELLC's "Employee of the Month" and "Employee of the Year" to another location; and (5) instruct Race Rock to address certain accessibility issues raised by the DRAC. It should be noted that the alteration of Item 3 (modifying the storage shed) was not even required under the ADA, but was agreed to because the requested alteration was so inexpensive. The alteration identified in Item 4 was not even raised by the DRAC in its pleading, but was voluntarily offered by the FSELLC. In addition, because the

Individual Plaintiffs and the DRAC's members were neither employees of the FSELLC, Race Rock, or Allright Sierra Parking, they were not entitled to alteration of Items 1 and 2. Nevertheless, the FSELLC voluntarily altered its facilities in good faith.

Other accessibility issues remained. The most prominent involved a row of three parking attendant toll booths at the exit of the FSEPC parking garage. Judge McKibben denied the Motion for Preliminary Injunction in its entirety, ruling specifically that it was "unlikely that the plaintiff [was] going to prevail on the merits involving the attendant booths." The Ninth Circuit Court of Appeals subsequently affirmed Judge McKibben's Order, and the DRAC did not challenge the Ninth Circuit's order.

Thereafter, the DRAC voluntarily dismissed all of its claims against Race Rock of Las Vegas, Inc. and Race Rock of Las Vegas, LLC. In fact, Race Rock ceased operations on April 9, 2001. Further, the DRAC never served Defendants Allright Sierra Parking, Inc. and Allright Corporation with a summons and Amended Complaint and, as a result, they were dismissed by the district court. Despite these dismissals, the DRAC refused to dismiss its identical claims against the FSELLC.

C. The Coca-Cola Kiosk.

In or about December 1995, the FSELLC and Coca-Cola entered into an exclusive Sponsorship Agreement whereby Coca-Cola was granted the exclusive right to offer for sale Coca-Cola beverages in the Fremont Street Experience. Pursuant to the Sponsorship Agreement, Coca-Cola was granted the right to construct outdoor kiosks for dispensing and vending Coca-Cola beverages and products. During

1997, two outdoor kiosks were constructed in the Mall. Coca-Cola paid all construction costs for both outdoor kiosks. Coca-Cola was the owner of the larger of the kiosks (the "Large Kiosk"), and retained net proceeds from sales of Coca-Cola products and merchandise sold therein.[3]

In moving for summary judgment, the FSELLC offered evidence of an architect's drawing demonstrating that the Large Kiosk was designed and built with a countertop that, at one point, was no higher than 36 inches off the ground as required by the ADA. At the other end of the counter, the Large Kiosk was equipped with a "Roll Out Counter" which was 44 inches wide and built "a maximum of 3'-0" above finished grade." The FSELLC also submitted correspondence from the City of Las Vegas, demonstrating that the Large Kiosk was designed specifically to comply with the ADA. The Large Kiosk was demolished and removed from the Fremont Street Experience in or about May 1999, for reasons unrelated to this litigation.

D. Temporary Stages.

As part of the entertainment and special events at the Fremont Street Experience, the FSELLC occasionally erects temporary stages. These temporary stage areas, however, are closed to the public at all times. The FSELLC set this policy when it first commenced using such stages, and did so because of potential liability issues in the event that a person were to injure himself on a stage. Performers are expressly instructed by the FSELLC not to invite members of the public onto the stage during a performance. Since the commencement of the district court action, the FSELLC has

3. Accessibility to the second of the two Coca-Cola kiosks was not at issue in the district court action.

gone so far as to contractually prohibit its performers from allowing any person "other than [the] performer or his staff" onto the stage for any reason. None of the Individual Plaintiffs or members of the DRAC have ever performed or been employed by a performer at a FSELLC special event.

Additionally, the FSELLC purchased two wheelchair lifts in October 1999, one for each stage, at a cost of $6,552. These lifts make each stage accessible to members of the public as well as performers and stage hands. Nevertheless, the FSELLC still maintains a policy prohibiting members of the public from stage areas.

E. Parking Attendant Toll Booths.

The FSEPC parking garage contains a row of three parking attendant toll booths, through which automobiles exit upon leaving the garage. At one time, one of the three booths provided a ramp leading up it, and the other two did not. To the FSELLC's knowledge, none of the Individual Plaintiffs or members of the DRAC were employed by or ever sought employment from Allright Sierra Parking, Inc., the entity that managed the parking garage.

Despite the foregoing facts, the DRAC demanded that ***all*** of the attendant booths be made accessible to the disabled. Although the district court had previously concluded that the DRAC was ***not*** likely to succeed with the merits of its case, and although that order was affirmed by the Ninth Circuit Court of Appeals, the FSELLC voluntarily and unconditionally agreed to install ramps leading up to the two remaining toll booths. On March 13, 2001, the DRAC approved the FSELLC's plans to alter the booths. Those alterations were completed prior to the hearing on the parties' cross-motions for summary judgment.

F. The FSELLC's Motion for Summary Judgment.

On April 13, 2001, the FSELLC moved for summary judgment, noting that all of the DRAC's complaints had been resolved, either by mootness (e.g., destruction of the Coca-Cola kiosk and closing of the Race Rock) or by voluntary modification (e.g., storage shed and toll booth alteration). The FSELLC further pointed out that the DRAC's original allegations of ADA violations had been greatly exaggerated and overstated.

In response, the DRAC offered no contradictory facts. Rather, Mr. Smith ventured back to the Fremont Street Experience (after the close of discovery) and sought to raise new issues of noncompliance. Specifically, the DRAC submitted evidence in violation of the Federal Rules of Civil Procedure and the district court's previous discovery order. Further, the evidence was never included as part of the DRAC's trial exhibits (and thus could not have been introduced at trial), and did not even appear to demonstrate any ADA violation. Accordingly, Judge Quackenbush entered summary judgment in favor of the FSELLC.

REASONS FOR DENYING THE PETITION

A. Standard of Review.

Federal law provides, in pertinent part, as follows:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who

> owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a). In the event of a violation of 42 U.S.C. § 12182, federal law provides for a limited remedy as set forth in 42 U.S.C. § 2000e-3(a). 42 U.S.C. § 12188(a). Section 2000e-3(a), part of the remedial provision of the Civil Rights Act of 1964, provides only for prospective injunctive relief, and not money damages. *Hoepfl v. Barlow*, 906 F. Supp. 317, 319 (E.D. Va. 1995).

B. The DRAC Is Not Entitled to Assert Nearly All of the Claims of ADA Violations.

As a threshold matter, it is important to note that the Individual Plaintiffs and the DRAC's members were not even entitled to assert most of the claims alleged in the Complaint and Amended Complaint. In particular, the Individual Plaintiffs and the DRAC's members were often not aggrieved parties, as there was no injury in fact caused by the FSELLC's alleged "discrimination." The allegations made were admittedly observations, and nothing more. Yet apparently many of these allegations were made under the notion that the ADA is a federally mandated building code that may be enforced by anyone at any time, without regard to Article III of the U.S. Constitution.

The FSELLC notes that the Individual Plaintiffs and the DRAC made the following "observations" of inaccessibility in the lower court action:

- **Yesco Shed** - Located within the FSEPC Parking Garage and operated by Yesco, the DRAC alleged that this restricted work area was inaccessible even though none of the Individual Plaintiffs or DRAC

members were employed by (or have ever applied for employment with) Yesco.

- **Parking Attendant Toll Booths** - Located within the FSEPC Parking Garage and operated by Allright Sierra, the Individual Plaintiffs and DRAC alleged that this restricted work area was inaccessible even though none are employed by (or have ever applied for employment with) Allright Sierra.

- **FSELLC Restroom** - Located within the FSELLC Executive Offices, the Individual Plaintiffs and DRAC alleged that this restroom was inaccessible even though none were employed by (or have ever applied for employment with) the FSELLC. Further, this condition (a urinal approximately four inches too high) was ***not*** discovered by Mr. Smith when trying to use the restroom. Rather, Mr. Smith noticed the condition only after slipping past the FSELLC receptionist in an attempt to gather evidence outside of the discovery process.

- **FSELLC Executive Offices** - The Individual Plaintiffs and the DRAC alleged that an "after hours" doorbell located at the FSELLC Executive Offices was too high. However, there was no indication that the Individual Plaintiffs or any of the DRAC's members ever visited after hours (when the FSELLC office door was locked), thus requiring its use. Moreover, none ever indicated that they intended to visit the FSELLC offices in the future.

- **Parking Spaces and Signage** - The Individual Plaintiffs and the DRAC alleged that the number of accessible parking spots was insufficient and that

handicapped spaces contained improper signage. However, none ever alleged that he or she even attempted to park a car in the garage.

- **Temporary Stages** - The Individual Plaintiffs and the DRAC alleged that they were entitled to have access to temporary stages, even though none had ever been employed by a performer at a FSELLC special event and, as members of the public, were not entitled to stage access.

- **Coca-Cola Kiosk** - The Individual Plaintiffs and the DRAC alleged at the time of filing their Complaint that they merely intended to visit the kiosk "from time to time" in the future.

- **Race Rock Restaurant** - The Individual Plaintiffs and the DRAC made allegations of inaccessibility before the restaurant even opened. In its Opposition to Plaintiffs' Motion for Temporary Restraining Order, the FSELLC noted that the Individual Plaintiffs and the DRAC had not even seen the inside of the restaurant. Only after the FSELLC pointed out this defect did Mr. Smith visit Race Rock, making "observations" solely for the purpose of litigation and solely in an attempt to manufacture standing where none existed.

The record is also devoid of allegations or evidence that any member of the DRAC is or has been employed by the FSELLC, Yesco, Race Rock, or Allright Sierra Parking, or that any member has ever sought such employment.

The Ninth Circuit Court of Appeals has held that a plaintiff cannot maintain an ADA action challenging the

lawfulness of an employee work area where that plaintiff is not an employee that would be subject to the alleged discrimination. *Long v. Coast Resorts, Inc.*, 267 F.3d 918, 924 (9th Cir. 2001). In *Long*, which also involved the DRAC and Mr. Smith, the Ninth Circuit stated:

> The ADA's citizen suit provision allows civil actions for injunctive relief to be brought "by the person aggrieved. . . ." 42 U.S.C. § 2000a-3(a). Neither of the individual plaintiffs, Long and Smith, works at the Orleans and plaintiffs have not alleged how they are in any way aggrieved by a violation occurring in an area accessible only to employees. Also, while the Supreme Court has long recognized that an association may have standing as the representative of its members . . . the Disabled Rights Action Committee has not alleged that any of its members are employees of the Orleans or would have occasion to enter the working areas of the slot change kiosks. Accordingly, these plaintiffs ***do not have standing*** to challenge any non-compliance in the employee area of the slot change kiosks.

Id. (citations omitted) (emphasis added).[4] On the same basis, Judge Quackenbush concluded that the DRAC had not suffered an "injury in fact." Whether the argument is characterized in terms of standing or injury in fact, the result is the same—the Individual Plaintiffs and the DRAC had no basis to allege ADA violations in employee work areas because they and their members were not employees of the FSELLC, Race Rock, or Allright Sierra, and thus had no entitlement to access those challenged areas.

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4. It appears that the DRAC did not petition this Court for a writ of certiorari after the Ninth Circuit decision in *Long*.

Curiously, although *Long* is directly on point, the DRAC completely fails to cite it in its Petition. It is not as though the DRAC was not aware of this case—the DRAC was a party in *Long*, and Mr. Armknecht was its attorney of record. Regardless of the DRAC's intentions in failing to cite to this case, *Long* is dispositive of nearly every alleged ADA violation in this matter, as almost all of the allegations in the lower court action involve employee work areas, and neither the Individual Plaintiffs nor the DRAC's members were employees of the FSELLC, Race Rock, or Allright Sierra Parking.

C. Many of the DRAC's Claims of ADA Violations Are Moot.

The DRAC also ignores the fact that many of its allegations of ADA violations were moot by the time the district court heard oral argument on the parties' cross-motions for summary judgment. Specifically, the Large Kiosk was dismantled in May 1999 for reasons unrelated to the litigation. Race Rock removed its exterior "retail trailer," which had also been the subject of the DRAC's claims, in November 1999 when the restaurant opened. The restaurant itself ceased operations on April 9, 2001.

At the time it moved for summary judgment, the FSELLC had addressed all outstanding accessibility issues to the DRAC's satisfaction. In fact, in the few instances where the FSELLC made alterations, such alterations were not required by the ADA, but were undertaken because alteration was far less expensive than litigation.

The resolution of these issues was demonstrated by a "Statement of Claims as Basis for Equitable Relief," filed in the district court by the DRAC on November 15, 2000,

pursuant to the district court's order. In the Statement, the DRAC identified only three outstanding accessibility issues:

1. Access to temporary performing stages;

2. Access to parking attendant booths; and

3. Access to "mobile retail sales facilities . . . entering the property from time to time."

However, the FSELLC had purchased wheelchair lifts for each of its temporary stages in October 1999. Further, although not even required by the ADA, the FSELLC constructed ramps leading to all three parking attendant toll booths.

The FSELLC was never quite able to understand what the DRAC meant when it alleged that "mobile retail sales facilities" were inaccessible. Said allegation was not part of the Complaint or the Amended Complaint. Further, the DRAC had not offered any evidence of "mobile retail sale facilities" in violation of the ADA prior to the filing of the FSELLC's Motion for Summary Judgment. Significantly, the DRAC's list of trial exhibits, which was served on April 16, 2001, made no reference to such facilities.

As a result, all outstanding accessibility issues were resolved at the time the district court entered summary judgment. There was no need for a trial, and no need for any order requiring the alteration of facilities. Because the ADA only allows for prospective injunctive relief, summary judgment was appropriate as to the DRAC's ADA claim. *See Hoepfl*, 906 F. Supp. at 319 (ADA provides only for preventive injunctive relief, and not money damages).

D. The DRAC Failed to Comply with Rule 56 in Opposing the FSELLC's Motion for Summary Judgment and in Filing Its Cross-Motion for Summary Judgment.

The DRAC also fails to note that it largely abandoned the requirements of Fed. R. Civ. P. 56 in opposing the FSELLC's Motion for Summary Judgment, and in filing its Cross-motion for Summary Judgment. Significantly, the DRAC did not dispute a single fact asserted by the FSELLC in its Motion for Summary Judgment. Neither Robert Lee nor Carol Lee submitted an affidavit in opposition to the FSELLC's Motion for Summary Judgment. In fact, they were not even listed as trial witnesses.

Instead, the DRAC relied heavily on affidavits that were ***not*** submitted with the DRAC's brief, but had been filed with the court approximately 18 months earlier. Of course, a district court has no obligation search through the court file "for evidence that establishes a genuine issue of fact when the nonmovant presents inadequate opposition to a motion for summary judgment." *Fair Housing Council of Riverside County, Inc. v. Riverside Two*, 249 F.3d 1132, 1136-37 (9th Cir. 2001). Nevertheless, the district court did just that at oral argument, and was still unable to find any genuine issues of material fact after reviewing these affidavits.

E. The DRAC Sought and Still Seeks a Sweeping Injunction Against the FSELLC That Would Be Improper.

At oral argument on the parties' cross-motions for summary judgment, it became apparent that the DRAC wanted much more than a district court order altering facilities. Rather, the DRAC was seeking some kind of sweeping order that would "cause [the FSELLC] to take

seriously its responsibilities under the ADA" and obtain a "change in the way that FSELLC does business with regard to ADA accessibility." This overreaching was similar to the DRAC's previous request for preliminary injunctive relief, in which it demanded that the district court shut down the ***entire*** Fremont Street Experience.

The DRAC ignores the record before it. The FSELLC went on the record to state that it did—and still does—take seriously its obligations under the ADA. Specifically, the FSELLC demonstrated that it regularly consults with counsel and with the Department of Justice on questions of ADA compliance. Further, during the course of the district court litigation, the FSELLC went to great expense to purchase mobile lifts for its temporary stage facilities and to make other accommodations to the DRAC, often where accommodations were not required under the law. The FSELLC even retained an engineer ***recommended by the DRAC*** to design ramps leading to the parking attendant toll booths.

In short, the DRAC has mistakenly and repeatedly alleged that the FSELLC has engaged in ADA violations, all in the hope that repetition—without evidence—would ultimately prevail. When the FSELLC attempted to resolve outstanding issues on an informal basis, the DRAC continued to unfairly and inaccurately smear the FSELLC as a bad corporate citizen with a "tradition" of ADA violations. Needless to say, the DRAC's unreasonableness was not contemplated by our nation's leaders when the ADA was enacted in 1990. *See* Statement by President George Bush Upon Signing S. 933, P.L. 101-336, 1990 U.S.C.C.A.N. 601 (July 26, 1990) (discussing the "careful balance struck between the rights of individuals with disabilities and the legitimate interests of business" in enacting the ADA).

Further, the DRAC's request—that the district court compel the FSELLC to "change" the way it does business—was astonishing. The DRAC had and still has absolutely no idea how the FSELLC conducts its business. It took no depositions in this matter, and took almost no discovery in this case. Despite the fact that it uncovered ***no evidence*** of inadequate oversight, the DRAC kept claiming that the FSELLC needed to change its ways.

In this light, the DRAC's citation to *Adarand Constr., Inc. v. Slater*, 528 U.S. 216 (2000), and cases like it, are inapplicable because they involve the voluntary cessation of unlawful ***practices and policies***. Lest the DRAC forgets, this case involves challenges to ***structures and facilities***, the alteration of which is not so easily accomplished. Does the DRAC truly believe that the FSELLC will "re-alter" facilities that were voluntarily changed (i.e., raising a bathroom urinal by four inches) once this Petition is determined? Frankly, the FSELLC has better things to do with its time.

Even to the end, the DRAC was never quite certain of what it wanted from the district court. It suggested that the district court compel the FSELLC to "hire someone" to monitor ADA compliance. It also suggested that the court order a "thorough" ADA Title III review of structures. Both suggestions, however, were merely that—suggestions. The DRAC offered no legal authority directing that such broad remedies are even permissible under the ADA. With regard to the DRAC's latter suggestion, it was undisputed that the district court litigation alone accomplished a tireless review by the FSELLC of all its permanent structures. Regardless, the DRAC still seems to be searching for ways to draw out this litigation, for no other

reason than to keep harassing the FSELLC and recover attorney's fees.[5]

The DRAC has ignored the appropriate legal standard in this matter. In a civil action alleging an ADA violation, preventive injunctive relief is the sole available remedy. *Hoepfl*, 906 F. Supp. at 319. To obtain preventive injunctive relief under the ADA, a plaintiff must demonstrate that there is a likelihood of suffering discrimination in the future. *Id.* at 323. The Ninth Circuit follows this rule, holding that an ADA plaintiff "can ***at most*** hope to improve access through an injunction." *Fischer v. SJB-P.D., Inc.*, 214 F.3d 1115, 1120 (9th Cir. 2000) (emphasis added).

A case that is particularly instructive is *Midgett v. Tri-County Metropolitan Transp. Dist.*, 74 F. Supp.2d 1008 (D. Ore. 1999). In *Midgett*, a disabled bus passenger sued the metropolitan transportation district under the ADA, arguing that the agency failed to provide adequate lifts on its buses. After making certain accommodations, the agency moved for summary judgment, arguing that the plaintiff had proved, at most, isolated ADA violations, but had failed to prove "a system-wide failure to provide accessible transportation. . . ." *Id.* at 1011. The district court agreed, granting summary judgment. In particular, the court noted that "ongoing occasional lift problems" on the buses did not violate the ADA, and that, under the circumstances, an injunction would be improper. The court added:

> Additionally, plaintiff has not met his burden of demonstrating a threat of ***irreparable*** future harm.

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5. Because there was no judicially sanctioned change in the parties' relationship in the lower court, the DRAC could not have obtained an award of attorney's fees as a prevailing party. *See Buckhannon Bd. and Care Home, Inc. v. West Va. Dep't of Health and Human Resources*, 532 U.S. 598 (2001).

> Although plaintiff has raised an inference that he might, in the future, again experience delay in getting to his destination, the record plainly demonstrates every time plaintiff has chosen to use Tri-Met, he ultimately has been transported to his destination. In view of that undisputed fact, and balancing that fact against the public's interest generally and Tri-Met's interests specifically, I find that injunctive relief in this case is unwarranted.

74 F. Supp. 2d at 1018 (emphasis in original).

In the district court action, the DRAC utterly failed to demonstrate that its members were denied services or accommodations. The Individual Plaintiffs made only observations for the purpose of creating litigation issues. Further, the DRAC completely failed to demonstrate a threat of irreparable future harm, and this is essential proof required to establish an entitlement to injunctive relief. Like the plaintiff in *Midgett*, the DRAC in this case failed to meet its burden of proof. Accordingly, the district court properly concluded as follows:

> [T]he court sees no justification . . . to substitute its judgment for that of FSELLC as to how to comply with the ADA or for this court to oversee FSELLC's efforts to so comply. There is nothing in the record to be the basis for this court becoming a monitor for FSELLC compliance with the ADA. FSELLC has voluntarily remedied every ADA violation alleged by the Plaintiffs, whether or not it was actually a violation. I therefore must conclude that the Plaintiffs are not entitled to injunctive relief under the federal ADA.

The Ninth Circuit, which looked at the entire record, including Mr. Smith's Affidavit, agreed, concluding that the FSELLC "took seriously its obligations under the ADA and voluntarily remedied many of the conditions complained of, whether they were required to or not." Therefore, summary judgment was properly granted.

F. Mr. Smith's Affidavit Was An Abuse of the Discovery Process.

In its Petition, the DRAC charges that the district court improperly excluded Mr. Smith's Affidavit when granting summary judgment in favor of the FSELLC. As a threshold matter, this argument is little more than an attempt to "correct" the lower courts in their resolution of this litigation. This is not a proper reason for seeking certiorari. *See Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 122 (1994) (achieving justice in a particular case "is ordinarily not sufficient reason" for granting certiorari). The DRAC's argument raises no constitutional issue. Nor does it involve a "split" among the circuits. Nor does the DRAC's Petition seek the interpretation of a federal statute or rule.

More importantly, the DRAC is simply wrong when it argues that the district court refused to consider Mr. Smith's Affidavit or its attachments. To the contrary, Judge Quackenbush's order granting summary judgment specifically notes that it considered the affidavit for the purposes of determining whether a permanent injunction was appropriate. The court stated:

> Plaintiffs now try to assert new claims by way of an affidavit of Plaintiff Smith filed on May 1, 2001, stating newly observed problems at the Fremont Street Experience. The affidavit raises

> completely new issues. The court is satisfied that it is not going to order prospective injunctive relief based on these newly raised issues. ***Even as to these newly observed problems, there has been no showing of injury in fact.***

Petition at p. 18a (emphasis added). Based on this language, the district court did in fact consider the Affidavit, despite its reservations about its admissibility, and ***still*** concluded that the DRAC could not avoid summary judgment.

The DRAC's attempt to characterize the decision to exclude Mr. Smith's Affidavit as conflicting with Supreme Court precedent presses the bounds of credibility, especially when viewed against the actual district court record. Months before the FSELLC even moved for summary judgment, the district court required the DRAC to file a "Statement of Claims" setting forth in detail its allegations of ADA noncompliance. The so-called "Statement of Claims" was required as a result of an exchange between the parties at a status conference on November 2, 2000. At that hearing, the DRAC misrepresented that alleged structural violations had not been resolved. Counsel for the FSELLC, in exasperated fashion, responded as follows:

> Your Honor, I'd like to voice my absolute befuddlement. Mr. Armknecht and I sat down last December and we resolved a number of issues based on the plaintiffs' allegations of noncompliance, and those issues were resolved. The ones that weren't resolved were adjudicated by Judge McKibben in the motion for preliminary injunction. . . . [A]fter that hearing and after changes were made, I wrote to Mr. Armknecht saying these changes have been made, if there are

> any problems, please let me know. And that was ten months ago, and I haven't heard from him since. I'm just – I'm just amazed that he would get up here and say that the Fremont Street Experience is cutting corners. . . . I want it on the record . . . if there are any compliance issues that need to be taken care of right now, so that – so that they can be taken care of, I would like to know what those are. Otherwise, I think we can move to summary judgment.

At that time, the district court suggested that "a more definite statement" would resolve the confusion about compliance issues, and the DRAC did ***not*** object. In fact, counsel for DRAC stated that he "underst[ood]" the need for such a statement. The DRAC subsequently filed a Statement of Claims, which the FSELLC relied upon in preparing its defense of the case.

Mr. Smith's Affidavit did not dispute any of the facts set forth by the FSELLC in its Motion for Summary Judgment. Rather, the Affidavit raised brand new allegations of noncompliance ***for the first time*** in the litigation. This was a last-minute tactic to avoid summary judgment, after realizing that all outstanding accessibility issues had been resolved.

Fed. R. Civ. P. 56(e) requires that evidence be admissible when submitted in support of or against a motion for summary judgment. In this case, the DRAC's eleventh-hour evidence was never disclosed during the discovery period, and the photographs attached to that affidavit were ***not even taken*** until after the FSELLC filed its Motion for Summary Judgment.

In the district court's Scheduling Order of November 7, 2000, Judge Quackenbush stated, in pertinent part, as follows:

> Rule 26 shall apply in its entirety to this case. This court views Rule 26 as an open file policy. Counsel shall hold an in-person Rule 26 Disclosure Conference on no later than December 8, 2000. Counsel shall voluntarily disclose anything counsel or their clients know having any relevance to this case, including the bad with the good, except for privileged information.

The submission of the DRAC's last-minute evidence presented a number of problems for the district court. First, the DRAC's photographs, as well as Mr. Smith's Affidavit, took the DRAC's allegations well beyond the Complaint, the Amended Complaint, and even the Statement of Claims that was expressly required by the district court. Second, the DRAC sought to introduce documentary evidence that was not even identified on its Trial Exhibit List. This presented a problem similar to that of the DRAC's failure to include Mr. and Ms. Lee on its witness list. Simply put, how could the DRAC expect to have its last-minute evidence admitted on summary judgment when it could not even offer these exhibits into evidence at trial?

Third, and worst of all, the DRAC again violated the rules of discovery (and the district court's order) by creating and producing evidence well after the discovery cut-off. The sanctions for a party's failure to make mandatory disclosures is well-settled—such a party is precluded from introducing into evidence the information that was not disclosed. Fed. R. Civ. P. 37(c)(1). It is no excuse that the photographs in question were not taken until after the discovery cut-off. Under Rule 26, the parties have an

obligation to disclose all documents "that the disclosing party may use to support its claims or defenses. . . ." Fed. R. Civ. P. 26(a)(1)(B). Rule 26(e) also requires the parties to supplement their disclosures when appropriate. Such violations, unless harmless, result in automatic sanctions which ***must*** be imposed by the district court. Hon. William W. Schwarzer, et al., *Federal Civil Procedure Before Trial* § 11:189 (1999), *citing* Committee Notes on Amendments to Federal Rules of Civil Procedure (1993), 146 F.R.D. 401, 691.

The FSELLC further notes that the district court litigation had been poisoned previously by the DRAC's litigation tactics. In 1999, the DRAC circumvented the rules of discovery by venturing without permission into the FSELLC Executive Offices and taking photographs of private employee work areas. Throughout the litigation, the DRAC took chameleon-like positions, ultimately forcing the district court to request a more specific statement of its claims. In 2001, the DRAC was still taking photographs, after discovery was closed, after its trial exhibit list had been filed, after receiving a dispositive motion, and hoping that it could pass off the photographs as admissible evidence.

Whether the DRAC's repeated failure to follow the rules of discovery and procedure was malicious or occurred in spite of its best intentions is beside the point. The DRAC's conduct made the district court litigation, at many points, all but impossible to defend. It goes without saying that the rules of discovery are designed to "make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 683 (1958).

The DRAC cannot suggest that the FSELLC was not prejudiced by its actions. Among other things, the FSELLC voluntarily made alterations that were not even required under the ADA, solely so that it could narrow the issues and achieve a final resolution of this case. The FSELLC spent substantial time, money, and effort to prepare and file its Motion for Summary Judgment. In response, the DRAC offered undisclosed allegations and new issues never previously identified.[6] Because of the timing of the DRAC's disclosures, the FSELLC ***was completely precluded*** from conducting discovery to determine the veracity and accuracy of the last-minute claims. Further, the DRAC's last-minute allegations would have required the reopening of discovery and the adding of parties. Had Judge Quackenbush allowed this, the DRAC would have been rewarded for its improper conduct.

While Judge Quackenbush ruled that the DRAC's eleventh-hour allegations of additional ADA violations did not give rise to injunctive relief, he did suggest that the DRAC could convert its last-minute allegations into a new and separate lawsuit against the FSELLC. Interestingly, and although more than one year has passed since that hearing, the DRAC has not filed a separate action against the FSELLC concerning the allegations made in Mr. Smith's Affidavit.

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6. It is improper for the DRAC to now justify Mr. Smith's Affidavit by claiming that "the best evidence of a defendant's conduct will always be the most recent evidence." Petition, p. 13. Using this logic, discovery in ADA cases would never end, as a plaintiff could raise new issues, even during trial, for the first time. Moreover, in opposing the FSELLC's objections to Mr. Smith's Affidavit, the DRAC did ***not*** argue that the conditions complained of did not exist until after the discovery cut-off, thereby precluding it from raising those issues during the discovery period.

Finally, it should be noted that the last-minute evidence submitted by the DRAC was not even probative of any ADA violation. In its reply brief on its Motion for Summary Judgment, the FSELLC engaged in a substantial discussion about why the DRAC's proffered evidence did not demonstrate any ADA violation. At oral argument, counsel for the FSELLC also addressed the insufficiency of DRAC's evidence. In both cases, the DRAC ***did not dispute*** the FSELLC's arguments. Therefore, the DRAC's last-minute evidence was not only procedurally improper, it did not even demonstrate the existence of an ADA violation.

CONCLUSION

Judge Quackenbush's order granting summary judgment in favor of the FSELLC was properly affirmed. Based on the Ninth Circuit's decision in *Long* (which the DRAC does not challenge), the DRAC does not have standing to assert nearly all of the ADA claims in this case. Further, the DRAC's remaining claims are moot, either through changed circumstances or by reason of the FSELLC's willingness to make accommodations, even where alteration was not required. There is simply no basis for indefinite prospective court oversight of the FSELLC, which would be the only possible result of granting certiorari. Accordingly, the FSELLC respectfully requests that this Court deny the DRAC's Petition in all respects.

Respectfully submitted,

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No. 02-625

In the

Supreme Court of the United States

DISABLED RIGHTS ACTION COMMITTEE,

Petitioner,

v.

FREMONT STREET EXPERIENCE LIMITED LIABILITY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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QUESTIONS PRESENTED

Where a plaintiff makes a claim alleging ongoing discriminatory conduct in violation of Title III of the Americans with Disabilities Act:

1. Whether the defendant may moot the cause of action by showing that the past instances of defendant's discriminatory conduct (that were identified in the complaint) have been corrected, but without showing that further instances of defendant's conduct will not occur in the future?

2. Whether an affidavit submitted in opposition to a defendant's motion for summary judgment may be disregarded, at the trial court's discretion, because the affidavit describes additional instances of the conduct that was the subject of the complaint, but which specific instances had not occurred until after the date of the complaint and were not described in the complaint?

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INTRODUCTION

The Brief in Opposition ("Oppo.")filed by Fremont Street Experience Limited Liability Company ("FSELLC") does not even attempt to address the questions presented for review. Indeed, the only argument made by FSELLC in direct opposition to the propriety of granting the writ of certiorari is that a mere attempt to "'correct' the lower courts in their resolution of this litigation . . . is not a proper reason for seeking certiorari." Oppo. at 22. In presenting this argument, FSELLC erroneously states that the "Petition [does not] seek the interpretation of a federal statute or rule." Oppo. at 22. As is clear from the Petition, however, both a federal statute and a federal rule are at issue.

The federal statute at issue is 42 U.S.C. § 12182(b)(2)(A)(ii) which expressly defines a form of "discrimination," for the purposes of 42 U.S.C. § 12182(a), to include discriminatory "policies, practices, or procedures." The first question presented in the Petition concerns whether this proscription of discriminatory *conduct* is subject to being mooted (under a standard that is the polar opposite of the standard set forth in *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216 (2000) and in *United States v. Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199 (1968)) by the artifice of literally "disintegrating" the violative *conduct* into discrete *instances* of discrimination.

The federal rule at issue is Rule 56(c) of the Federal Rules of Civil Procedure which provides, with regard to the proceedings on a motion for summary judgment, that "[t]he adverse party prior to the day of the hearing may serve opposing affidavits." The Ninth Circuit imposed a novel limitation on the scope of the admissibility of affidavits

opposing summary judgment (again, by the artifice of literally "disintegrating" the violative *conduct* into discrete *instances* of discrimination). The second question presented in the Petition clearly concerns the Ninth Circuit's departure from the plain terms of Rule 56(c) of the Federal Rules of Civil Procedure.

I. Most of FSELLC's Arguments are Ill-Suited to Addressing the Petition.

The Brief in Opposition is more of a plaudit of the District Court's decision than it is a defense of the Ninth Circuit's decision. Apart from its conclusory (and plainly mistaken) contention that the Petition does not seek the interpretation of a federal statute or rule, the Brief in Opposition does not present any argument contesting the Petition's submission that the *questions presented* are important and merit this Court's consideration. Instead, FSELLC has submitted to this Court a "warmed-over" version of the "Appellee's Brief" filed with the Ninth Circuit on January 16, 2002. FSELLC's effort to re-use its earlier pleading provides the Court with arguments that are largely a non-sequitur to the Petition.

For example, the questions presented to this Court for a writ of certiorari (and, indeed the questions presented to the Ninth Circuit for review) do not concern any ADA violation other than FSELLC's "pattern, practice, or procedure" of permitting inaccessible temporary and mobile facilities onto the Fremont Street Experience. Thus, no purpose is served by FSELLC's extensive discussion (*see*, Oppo. at 4-9, and 11-15) of various physical structures (that have been made accessible through this litigation) and of Petitioner's lack of standing to bring suit to correct

inaccessible employee work areas. Similarly, the District Court's procedural decisions (*e.g.*, requiring Disabled Rights to file a "Statement of Claims" and awarding summary judgment to FSELLC despite its failure to file a "statement of undisputed facts," *see* App. at 9a) were not disturbed by the Ninth Circuit (and no party before the Ninth Circuit challenged those decisions).

II. FSELLC's Discriminatory Policy, Practice, or Procedure Was Properly Before the District Court.

FSELLC fervently attempts to assume the role of an ingenue in professing that it "was never quite able to understand what the DRAC meant when it alleged that 'mobile retail sales facilities' were inaccessible." Oppo. at 16. The act is not convincing.

The Second Amended Complaint noted inaccessible conditions at both the Race Rock mobile store (at Paragraph 10(b)) and at a temporary food kiosk.[1] Certainly, any "befuddlement" on the part of FSELLC regarding the claim that was presented to the Ninth Circuit for review (a claim concerning discriminatory *conduct)* could not have lingered after the filing of the "Statement of Claims[2]" which clearly

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[1] Paragraph 10(c) of the Second Amended Complaint stated that "DRAC's members desire the opportunity to shop at the food kiosk (and any other temporary kiosk operated at the Fremont Street Experience) without being subjected to the affront and indignity of enduring discrimination."

[2] The District Court did not consider the "Statement of Claims" to be sufficiently "specific." *See* App. at 12a. Apparently, the District Court was interested in knowing what specific *facilities* would be in violation at the time that the motion for summary judgment was filed. Where temporary and mobile facilities are at issue (and absent

stated that an ongoing violation was "[i]naccessible mobile retail sales facilities in violation of ADAAG 7.2(1) entering the property from time to time."

III. An Injunction May Be Granted to Stop FSELLC's Discriminatory Policy, Practice, or Procedure.

FSELLC essentially argues that 42 U.S.C. § 12182(b)(2)(A)(ii) is unenforceable because the ADA's provision for injunctive relief does not permit a court to order "broad remedies" and that an effort to enjoin a discriminatory policy, practice or procedure constitutes "unreasonableness" that is contrary to the underlying purposes of the ADA. Oppo. at 17-19. In this regard, it must again be noted that the Ninth Circuit did not chose to address FSELLC's argument that injunctive relief under the ADA is limited in the manner that FSELLC suggests. Next, it should be noted that this Court has upheld an injunction of a policy found to be in violation of 42 U.S.C. § 12182(b)(2)(A)(ii). *See, PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001). Finally, FSELLC's citation to (the former) President Bush's praise of the "careful balance struck between the rights of individuals with disabilities and the legitimate interests of business" should not be construed to suggest that the disabled are not entitled to the access that is expressly prescribed by Title III of the ADA and its implementing regulations, nor that ongoing discriminatory

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precognition), such "specificity" is, of course, impossible to provide. Furthermore, the "Statement of Claims" should not provide a district court with a method of bypassing "Rule 8(a)'s simplified notice pleading standard." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513-14 (2002) (noting that "Rule 8(e)(1) states that '[n]o technical forms of pleading or motions are required,' and [that] Rule 8(f) provides that '[a]ll pleadings shall be so construed as to do substantial justice.'")

conduct constitutes a "legitimate interest" of business.

FSELLC argues that Disabled Rights lacks even standing to obtain injunctive relief in this case. Oppo. at 20-22. This argument (again, one which was presented to the Ninth Circuit which did not rule on the argument – even though a ruling favorable to FSELLC would have obviated any need for the Ninth Circuit to address evidentiary matters) has three prongs.

First, FSELLC cites to the truism that injunctive relief is only issued with regard to future harm. What FSELLC ignores – in this matter which concerns *the lower courts' ignoring evidence* – is the fact that mootness is at issue, not standing, so the burden of proof should (under every known case other than the case presented for review) be on the *defendant* to demonstrate mootness.

FSELLC's second argument is that, because no members of the Disabled Rights Action Committee were "denied services or accommodations," Disabled Rights never had standing in the first place. That argument[3] was accepted by the District Court, but the Ninth Circuit simply did not accept FSELLC's invitation to nullify the word "readily" as it is used in 42 U.S.C. § 12183(a)(1) (requiring new facilities to be "readily accessible and usable by individuals with disabilities.") *See also, Long v. Coast Resorts, Inc.*, 267 F.3d 918, 923 (9th Cir. 2001).

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[3] Which argument relies upon *Midgett v. Tri-County Metropolitan Transp. Dist.*, 74 F.Supp. 2d 1008 (D. Ore. 1999), a case that does not even address Title III of the ADA, but is limited to Title II of the ADA.

Finally, FSELLC argues that its compliance with *other* requirements of Title III of the ADA was a proper alternative basis for awarding it summary judgment vis-a-vis its ongoing discriminatory conduct that is at issue in the Petition. Oppo. at 21-22. Although the Ninth Circuit did allude to FSELLC's remedying "many of the conditions complained of," it would be a broad leap to conclude that the Ninth Circuit affirmed the District Court on such basis. Indeed, the presiding judge of the panel whose decision is presented for review was the Honorable Michael Daly Hawkins, who was the author of *Long v. Coast Resorts, Inc.*, 267 F.3d 918 (9th Cir. 2001). In that case, the Ninth Circuit considered a decision of the U.S. District Court for Nevada where the district court had found a violation of Title III of the ADA, but nonetheless declined to order injunctive relief because:

> [w]hile this may be a technical violation of the language of the Guidelines, the Court finds there has been substantial compliance with the spirit of the law. Considering the enormous expense required to modify the structure, and the near absence of hardship and that constituting a minimal inconvenience to wheelchair users, this Court is loathe [sic] to grant injunctive relief to Plaintiffs on this issue.

Long v. Coast Resorts, Inc., 32 F.Supp.2d 1203, 1212 (D.Nev. 1999).

The Ninth Circuit reversed the district court's "determination that, because the Orleans demonstrated obedience to the spirit of the ADA, plaintiffs were not entitled to injunctive relief." *Long v. Coast Resorts, Inc.*, 267

F.3d 918, 923 (9th Cir. 2001). FSELLC is familiar with the Ninth Circuit's decision in *Long v. Coast Resorts, Inc.*,[4] but still contends that a business is entitled to pick and choose what parts of the ADA it will obey. Thus, even though (since 1995) the disabled community has complained about FSELLC's discriminatory practice of permitting inaccessible *temporary and mobile* retail sales facilities onto the Fremont Street Experience, FSELLC steadfastly refuses to require conformance with appropriate legislative regulations because FSELLC has remedied some of the structural violations associated with *permanent* structures at the Fremont Street Experience.

IV. FSELLC Confuses "Discovery" With Affidavits in Opposition to Summary Judgment.

FSELLC's concept of "discovery" is completely at odds with "discovery" as described in the Federal Rules of Civil Procedure. In short, "discovery" (as set forth in the rules) includes (in addition to required disclosures) "depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon the land or other property under Rule 34 or 45(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admission." Fed. R. Civ. Proc. 26(a)(5). A party's own affidavit is simply not "discovery." If it were, then the provision in Rule 56(c) of the Federal Rules of Civil Procedure which affords the opportunity for affidavits in opposition to summary judgment would be rendered a

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[4] FSELLC cites to *Long v. Coast Resorts, Inc.*, 267 F.3d 918 (9th Cir. 2001) three times (for a point of law that is irrelevant to the questions presented). *See* Oppo. at 14, 15, 29.

nullity in cases where the motion for summary judgment is filed after the close of discovery. Because motions for summary judgment are frequently filed after the close of discovery, the rationale presented by FSELLC (again, one which was presented to the Ninth Circuit, but which was not addressed by the Ninth Circuit) would radically change practice and procedure relating to motions for summary judgment.

V. FSELLC's Discriminatory Policy, Practice, or Procedure Is Ongoing.

The Brief in Opposition repeatedly contends that FSELLC's discriminatory conduct[5] is in the past. Ironically, on December 13, 2002, a new case was filed in the U.S. District Court for the District of Nevada. *See* App. D at 31a. That case, *Thompson, et al. v. The Fremont Street Experience Limited Liability Co.*, CV-S-02-1642-LRH-PAL (a copy of which was sent via facsimile to FSELLC's counsel on December 12, 2002[6]), notes that the discriminatory conduct of FSELLC is ongoing as of December 5, 2002, and seeks an injunction to stop FSELLC from "permitting persons to locate inaccessible temporary or mobile retail sales facilities onto the Fremont Street Experience."

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[5] FSELLC has also contended that the evidence excluded from consideration is insufficient to demonstrate an ADA violation. Oppo. at 28. Sufficiency of the evidence, is, of course, a matter to be determined at trial and not in a motion for summary judgment.

[6] Because of the timing at issue and the realities of preparing booklet form pleadings, Petitioner does not accuse FSELLC of making a misrepresentation at page 27 of the Brief in Opposition (where FSELLC refers to the absence of a new "separate action against the FSELLC").

On the one hand, the filing of *Thompson, et al. v. The Fremont Street Experience Limited Liability Co.*, might lead the Court to conclude that, because the questions presented in the Petition will certainly be faced by the lower courts in the near future, it need not grant certiorari. Petitioner, however, urges the Court to consider the "sunk costs to the judicial system" in this matter. *See, Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 191-192 (2000). Specifically, this "case has been brought and litigated . . . for years. To abandon the case at an advanced stage may prove more wasteful than frugal." *Id.*

If *Thompson, et al. v. The Fremont Street Experience Limited Liability Co.*, follows the pattern of the case below, the plaintiffs there will not be able to maintain their claim regarding FSELLC's discriminatory conduct because the lower courts will again deem FSELLC's conduct to consist of discrete instances of discrimination that can be mooted. Thus, three years hence, the plaintiffs in *Thompson, et al. v. The Fremont Street Experience Limited Liability Co.* will be seeking a writ of certiorari from this Court regarding the same questions presented in the Petition.

CONCLUSION

FSELLC does not argue that courts may properly "disintegrate" claims of discriminatory *conduct* into discrete (and mootable) *instances* of discrimination, as it is clear enough that claims alleging a course of discriminatory conduct "are different in kind from discrete acts. Their very nature involves repeated conduct. . . . Such claims are based on the cumulative affect of individual acts." *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, ___, 122 S.Ct. 2061, 2073 (2002) (citations omitted). It is, however,

clear that the Ninth Circuit's decision in the case submitted for review is fundamentally in conflict with this Court's recent distinction between discriminatory conduct and discrete acts of discrimination, and that (consistent with the principles enunciated in *Lawrence v. Chater*, 516 U.S. 163, 167 (1996)) a GVR order should be entered which would give the Ninth Circuit an opportunity to consider *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, ___, 122 S.Ct. 2061, 2073 (2002) in the context of the litigation.

Respectfully submitted.

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APPENDIX D

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

[Filed December 13, 2002]

TAMARA THOMPSON; and DISABLED RIGHTS ACTION COMMITTEE, a Utah non-profit corporation, Plaintiffs,	)	
vs.	)	NO. CV-02-1642 LRH(PAL)
THE FREMONT STREET EXPERIENCE LIMITED LIABILITY COMPANY, a Nevada limited liability company, Defendant.	)	**COMPLAINT**

COME NOW Plaintiffs, TAMARA THOMPSON;

and DISABLED RIGHTS ACTION COMMITTEE, ("Disabled Rights"), by and through their attorney, the law firm of Armknecht & Cowdell, P.C., and for their claims for relief against Defendant, THE FREMONT STREET EXPERIENCE LIMITED LIABILITY COMPANY, a Nevada limited liability company ("FSELLC"), allege as follows:

1. This is an action for injunctive relief to remedy Defendant's "administrative methods"; "pattern or practice"; and/or "policies, practices or procedures" which have the effect of subjecting disabled persons (Tamara Thompson, individually, and Disabled Rights' other wheelchair-user members) to unlawful discrimination in places of public accommodation. Plaintiffs complain of Defendant's ongoing conduct of permitting discrimination in violation of Title III of the Americans with Disabilities Act, 42 U.S.C. § 12181 et. seq., (the "ADA"). The discrimination at issue is architectural barriers which prevent "ready access" to wheelchair users.

2. Public accommodations and commercial facilities built for first occupancy after January 26, 1993, are required to be "readily accessible to and useable by individuals with disabilities." 42 U.S.C. §12183(a)(1). The Department of Justice, in accordance with 42 U.S.C. §12186(b), has provided, in its implementing regulations for Title III of the ADA, the "Standards for Accessible Design." See, 28 C.F.R. Part 36. Those standards are set forth in Appendix A of 28 C.F.R. Part 36, and are known as the "ADA Accessibility Guidelines"' which are referred to herein as the "ADAAG." Despite the clear mandate of the ADA, the clear standards of the ADAAG, entreaties from the disabled as early as 1995, and a previous lawsuit (wherein the United States District

Court for the District of Nevada declined to address the claims made herein by deeming the claims -- which were presented as evidence -- to constitute "new issues"), Defendant steadfastly maintains its permissive conduct vis-a-vis the facilities allowed onto the Fremont Street Experience.

JURISDICTION AND VENUE

3. Plaintiff TAMARA THOMPSON files this action individually, and Plaintiff DISABLED RIGHTS ACTION COMMITTEE files this action on behalf of its members who are wheelchair users (which include Tamara Thompson). The Court has jurisdiction of this action under 28 U.S.C. §§ 1331 and 1343(a)(4), and 42 U.S.C. § 12188(a)(1).

4. Venue of this action is appropriate in the United States District Court for the District of Nevada, Southern Division, pursuant to 28 U.S.C. § 1391(b) and (c) as the claim arose in such district and, further, as Defendant conducts business in such district.

THE PARTIES

5. Plaintiff TAMARA THOMPSON is a natural person who resides in southern Nevada. She requires a wheelchair for mobility. TAMARA THOMPSON has standing to bring this action under 42 U.S.C. § 12188(a)(1) because she was subjected to discrimination by Defendant and because she will continue to be subject to discrimination until Defendant ends its discriminatory conduct.

6. Plaintiff DISABLED RIGHTS ACTION COMMITTEE ("Disabled Rights") is a Utah non-profit corporation organized with the principal purpose of helping to eliminate discrimination against individuals with disabilities by ensuring compliance with laws intended to provide access to housing, public buildings,

transportation, goods and services. The Americans with Disabilities Act (ADA) constitutes such a law. Disabled Rights is qualified as a charitable organization under 26 U.S.C. § 501(c)(3). Members of Disabled Rights are primarily individuals with disabilities and persons related to individuals with disabilities. Disabled Rights is headquartered in Salt Lake City, Utah, and has over 1,000 members nationwide. As a result of their disabilities, certain features of accessibility are necessary to allow Disabled Rights' members access to public buildings, transportation, goods and services, which access is required under Title III of the ADA. Most of Disabled Rights' Nevada members reside in Clark County, Nevada, and they must base their decisions regarding what public accommodations they should patronize on the accessibility of the public accommodations. Accordingly, Disabled Rights' disabled members cannot fully and evenly participate in the amenities of living in Las Vegas unless Defendant complies with the requirements of Title III of the ADA. Disabled Rights has standing as the representative of its members.

7. Defendant FSELLC is a Nevada limited liability company doing business in Clark County, Nevada. FSELLC is subject to the requirements of the ADA because it operates and/or is the lessor of public accommodations, as defined in Title III of the ADA, 42 U.S.C. § 12181. The Fremont Street Experience was constructed subsequent to January 26, 1993, and accessibility features of such accommodation must accordingly meet the high standard imposed by the ADA upon "new construction." FSELLC has authority to prohibit persons from locating inaccessible temporary or mobile retail sales facilities onto the Fremont Street Experience.

FACTUAL BACKGROUND

8. On November 30, 1995, Mr. Ronald Ray Smith (a wheelchair user residing in Las Vegas, Nevada) wrote a letter to Mr. Donald D. Snyder, an officer of FSELLC. In the letter, Mr. Smith informed Mr. Snyder that Mr. Frank Stephens (a wheelchair user) had visited The Fremont Street Experience where he had encountered temporary facilities which did not afford wheelchair users with "ready access." Mr. Smith's letter concluded with a request for a modification of FSELLC's policies practices, or procedures: "If your staff has not thought to provide the ready access to your temporary facilities, please issue the necessary orders to provide it, for this occasion and all future occasions."

9. Despite Mr. Smith's request, FSELLC's policies, practices, and procedures continued to permit inaccessible temporary and mobile facilities (as well as inaccessible permanent facilities) to locate onto The Fremont Street Experience. On October 26, 1998, Mr. Smith and the Disabled Rights Action Committee filed a complaint against Defendant in the U.S. District Court for the District of Nevada alleging, inter alia, violations of Title III of the Americans with Disabilities Act (codified at 42 U.S.C. § 12181, et seq.) and praying for, inter alia, "an injunction enjoining Defendant Fremont Street Experience Limited Liability Company from continuing discrimination." After significant motions practice had been conducted, FSELLC filed its "Motion for Summary Judgment"on April 13, 2001.

10. On May 1, 2001, the plaintiffs in the earlier case filed (as an exhibit to "Plaintiffs' Opposition to FSELLC's Motion for Summary Judgment") the "Third Affidavit of Ronald Ray Smith," which demonstrated that, as of April 21, 2001, FSELLC continued to permit

retail sales facilities having inaccessible customer service counters (specifically, a mobile grill and two mobile bars) to locate onto The Fremont Street Experience.

11. On July 23, 2001, this Court's "Memorandum Opinion and Order Denying Plaintiffs' Motion for Summary Judgment and Granting Defendants' Motions for Summary Judgment" was entered, wherein this Court stated that:

> Plaintiffs now try to assert new claims by way of an affidavit of Plaintiff Smith filed on May 1, 2001, stating newly observed problems at the Fremont Street Experience. This affidavit raises completely new issues. The court is satisfied that it is not going to order prospective injunctive relief based on these newly raised issues. Even as to these newly observed problems, there has been no showing of injury in fact. If Plaintiffs feel that they can establish that they have suffered an injury in fact by way of the newly raised problems, and are unable to get relief from FSELLC or whoever is responsible, these new issues could form the basis of a new case seeking preliminary injunctive relief.

The Court's previous judgment thus makes it clear that res judicata does not preclude the claims presented herein as, "[i]n order for res judicata to apply there must be: 1) an identity of claims, 2) a final judgment on the merits, and 3) identity or privity between parties." Western Radio Services Co., Inc. v. Glickman, 123 F.3d 1189, 1192 (9th Cir. 2002) (citing Blonder-Tongue Lab. v. University of Ill. Found., 402 U.S. 313, 323-24 (1971)). Because the Court clearly stated that the claims are "completely new issues" (and accordingly did not reach the merits), res judicata cannot apply.

12. On the evening of December 5, 2002, Tamara Thompson and another member of Disabled Rights (which member uses a motorized scooter) attended a "ho down" at the Fremont Street Experience which was being held for one night only – in celebration of the start of the 2002 National Finals Rodeo. While at the ho down, Tamara Thompson and the other member of Disabled Rights patronized two temporary bars which had been set up for business at the Fremont Street Experience. On information and belief, the temporary bars are the same facilities that were encountered by Mr. Ronald Ray Smith on April 21, 2001. The temporary bars did not afford ready access to wheelchair users. Specifically, the bars did not provide any portion of counter space that was not higher than 36 inches. Furthermore, the temporary bars did not provide a level ground surface upon which a wheelchair user could transact the purchase of a beverage. While Tamara Thompson and the other member of Disabled Rights did successfully purchase beverages, the lack of ready access caused them to sustain substantial affront and indignity.

13. Tamara Thompson and the other members of Disabled Rights residing in Las Vegas are injured (on an ongoing basis) by FSELLC's continuing to permit persons to locate inaccessible temporary or mobile retail sales facilities at the Fremont Street Experience. Plaintiffs believe that Defendant's ongoing failure to exercise its authority to require accessibility at the Fremont Street Experience will cause Plaintiffs to continue to encounter discrimination at temporary and mobile retail sales facilities at the Fremont Street Experience. Plaintiffs are subjected to such discrimination (and the injuries concomitant to discrimination, such as - but not limited to - humiliation, anger, affront and indignity) on an ongoing

basis (even without actually patronizing the Fremont Street Experience), as their entertainment choices and opportunities are unfairly limited when facilities are not readily accessible.

FIRST CAUSE OF ACTION

(Violation of Title III of the ADA -- Administrative Method Having Discriminatory Effect)

14. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 13 hereof, and incorporate the same herein by reference.

15. Among the "general prohibitions" of Title III of the ADA are "administrative methods" which "have the effect of discriminating on the basis of disability"or "that perpetuate the discrimination of others who are subject to common administrative control." 42 U.S.C. § 12182(b)(1)(D).

16. Defendant's administrative methods do not prevent the discriminatory effect of persons locating inaccessible temporary or mobile retail sales facilities at the Fremont Street Experience.

SECOND CAUSE OF ACTION

(Violation of Title III of the ADA -- Failure to Modify a Policy, Practice, or Procedure)

17. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 16 hereof, and incorporate the same herein by reference.

18. Title III of the ADA prohibits "a refusal to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges,

advantages, or accommodations to individuals with disabilities . . . ." 42 U.S.C. § 12182(b)(2)(A)(ii). Defendant has a policy, practice or procedure of permitting persons to locate inaccessible temporary or mobile retail sales facilities at the Fremont Street Experience.

19. Prior to December 5, 2002, Defendant was requested to end its policy, practice, or procedure of permitting persons to locate inaccessible temporary or mobile retail sales facilities at the Fremont Street Experience.

20. Plaintiff Tamara Thompson and Plaintiff Disabled Rights' members (who are injured by Defendant's policy, practice, or procedure of permitting persons to locate inaccessible temporary or mobile retail sales facilities at the Fremont Street Experience) are wheelchair users, and provision of facilities that provide ready access to wheelchair users is therefore necessary for them.

21. The ready access that is sought by Plaintiffs would not require any facility to exceed the standards established under the applicable legislative regulations of the United States Department of Justice (see 28 CFR Part 36).

THIRD CAUSE OF ACTION

(Violation of Title III of the ADA -- "Pattern or Practice")

22. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 21 hereof, and incorporate the same herein by reference.

23. Defendant's permitting persons to locate inaccessible temporary or mobile retail sales facilities at the Fremont Street Experience is constant and repetitive, and constitutes an ongoing "pattern or practice" of discrimination.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that judgment be entered against Defendant:

(a) For a permanent injunction enjoining Defendant, its agents, employees and assigns from discrimination on the basis of disability in violation of Title III of the Americans with Disabilities Act, 42 U.S.C. § 12181, et seq., and specifically requiring Defendant to (1) cease its administrative methods; (2) modify its policies, practices and procedures; and/or (3) cease its pattern or practice of discrimination which method, policies, practices, procedures, or pattern have the effect of permitting persons to locate inaccessible temporary or mobile retail sales facilities onto the Fremont Street Experience;

(b) For an order directing the disgorgement (payable to such person or persons deemed appropriate by the Court) of Defendant's wrongful gains related to it's ongoing violation of Title III of the ADA;

(c) For Plaintiffs' litigation expenses, including attorney's fees, and costs of suit; and

(d) For such other and further relief (both under law and under the Court's broad equitable jurisdiction) deemed appropriate by the Court.

RESPECTFULLY SUBMITTED this 12th day of December, 2002.

ARMKNECHT & COWDELL, P.C.
By: /s/
Richard F. Armknecht, III, Esq.
(Nevada Bar No. 5205)

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